Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID K. STONE AND NICHOLAS B. LOUNDAGIN,

Petitioners,

v.

DEVON ENERGY PRODUCTION COMPANY, L.P. AND CARPENTER & SONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Wyoming Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a party to a suit is not provided notice of or an opportunity to be heard at any stage of the litigation on the issue that an appellate court decides the case upon, has that party's right to due process under the Fourteenth Amendment to the Constitution of the United States been denied?

LIST OF PARTIES

The caption of the case in this Court contains the names of all the parties.

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The initial opinion of the Wyoming Supreme Court is reported at *Stone v. Devon Energy Prod. Co., L.P.,* 181 P.3d 936 (Wyo. 2008) (*"Stone I"*) and is reproduced at App. at 21-45. After remand to the lower court, the final opinion of the Wyoming Supreme Court is reported at *Stone v. Devon Energy Prod. Co., L.P.,* 216 P.3d 489 (Wyo. 2009) (*"Stone II"*), and is reported at App. at 1-13.

JURISDICTION

The judgment of the Wyoming Supreme Court was issued on September 15, 2009. Petitioners' timely filed petition for rehearing was denied on October 13, 2009 (App. 63). This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States Amendment XIV.

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. In February, 2000, Respondent Carpenter & Sons, Inc. acquired from Petitioners David K. Stone and Nicholas B. Loundagin an assignment of operating rights to various Federal and State of Wyoming oil and gas leases. Approximately three months after this agreement was signed, Carpenter sold most of his interest in the subject properties to Respondent Devon Energy Production Company L.P. as reflected by the parties' modified agreement. A "Supplemental Agreement Modifying Original Agreement dated February 17, 2000" was executed by the parties on or around May 25, 2000, which had the effect of allowing Devon to acquire, *inter alia*, the "shallow" or coal bed methane rights to the subject State of Wyoming Oil and Gas Lease ("State Lease"). The provision of the Supplemental Agreement most relevant to this Petition is found in paragraph 6 thereof, which provides:

> All assignments naming Devon as provided for in this Supplemental Agreement shall, in addition provide that the said Assignee and its successors and assigns shall offer in writing to Stone Exploration, Inc. for the benefit of the Assignor, *a reassignment of all*

> *its rights under any of the leases and lands referred to herein not later than 6 months prior to the expiration of each such lease.* (Emphasis added.) (Hereafter referred to as the "Reassignment Clause".)

At the time of the execution of the parties' agreements, there was no production of oil and gas substances on the State Lease, and it was set to expire on April 2, 2002. As of October 2, 2001, which was the last date under the Reassignment Clause that Devon was to have commenced drilling on the State Lease (or otherwise cause the State Lease term to be extended), the expiration date of the State Lease had not been extended. When the parties' negotiations for an extension of the deadline failed, Stone sent written demand to Devon on December 6, 2001 to reassign the State Lease. This demand was ignored by Devon and, without any authorization from Stone and Loundagin, Devon began drilling a shallow well on the State Lease on March 30, 2002. Despite Stone and Loundagin's protests, several more wells were drilled by Devon producing revenues from the extracted natural gas exceeding $55 million.

2. Stone and Loundagin filed their complaint against Devon and Carpenter in a Wyoming state court seeking their ejectment from the State Lease, specific performance as to the reassignment of the lease rights held by Devon and Carpenter back to Stone and Loundagin, a determination of trespass, conversion and breach of contract by Devon, an injunction to be issued against any further trespass or conversion on the lease and an accounting of all

income derived from the lease after the lease reassignment was to have taken place.[1] After Devon and Carpenter filed their answer, Stone and Loundagin filed a motion for partial summary judgment only as to Devon and Carpenter's liability under the breach of contract and ejectment counts. (App. 103). More to the point, Stone and Loundagin did not at this stage of the litigation seek any determination of the amount of their damages. While Devon and Carpenter filed a response to Stone and Loundagin's summary judgment motion, they did not file a cross motion for summary judgment or indicate in their response any intention to do so. More important, Devon and Carpenter did not even mention Stone and Loundagin's damages as an issue in their response (or at the oral arguments). (App. 82-94). On July 9, 2007, the state district court granted summary judgment in favor of Devon and Carpenter on just the enforceability of the Reassignment Clause. (App. 46-62), and Stone and Loundagin appealed to the Wyoming Supreme Court.

3. In the parties' briefs to the Wyoming Supreme Court, the arguments were only as to the interpretation of the Reassignment Clause, as were the oral arguments to the Wyoming Supreme Court. In its decision, the Wyoming Supreme Court held " . . . that the [Supplemental Agreement's] reassignment clause required Devon and Carpenter to make an

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[1] This case was originally filed in the United States District Court for the District of Wyoming on June 12, 2006 (Case No. 82727-B), but was dismissed on October 12, 2006.

offer to reassign the operating rights to Mr. Stone and Mr. Loundagin on or before October 2, 2001". *Id.* at 943. (App. 36). Accordingly that Court found that " . . . the District Court's interpretation of the contract was in error". *Id.* (App. 38). However, that Court's decision went on to find that, for there to be recovery under Stone and Loundagin's claim of breach of contract, there must not only be the violation of the contract, but that damages must have resulted therefrom. Critical to this Petition was the Wyoming Supreme Court's holding affirming the summary judgment that "[h]ere, Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of contract". *Id.* (App. 38). Stone and Loundagin's remaining claims were remanded to the lower court with the direction that "[w]ith respect to the remaining claims for ejectment, trespass and conversion, it seems clear from the limited record before us they, like the damages, cannot be established." (App. 40).[2]

4. Stone and Loundagin filed a Petition for Rehearing with the Wyoming Supreme Court arguing that their procedural due process rights had been violated since the Wyoming Supreme Court's decision was decided upon an issue of damages that Stone and Loundagin had never had notice or an opportunity to

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[2] This decision was not a final appealable order because of the remand. *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995); *Lofflund Bros. Co. v. Rougeau*, 655 F.2d 1031 (10th Cir. 1981).

address as part of their motion of partial summary judgment or the appeal thereon. (App. 76-77).

5. Upon remand, the lower court granted summary judgment in favor of Devon and Carpenter on all remaining claims, but refused to state any findings in support of the judgment. (App. 14-18). Stone and Loundagin appealed this summary judgment to the Wyoming Supreme Court, which affirmed the lower court by finding that the *Stone I* remand of the remaining claims of Stone and Loundagin "was improvident". (App. 11). Rather, based on its prior decision, the Wyoming Supreme Court concluded there could be no relief granted on the other non-breach of contract claims since, without damages to support a breach of the Reassignment Clause, the remaining claims could not be proven. (App. 11).

6. A Petition for Rehearing regarding *Stone II* was filed with the Wyoming Supreme Court by Stone and Loundagin (App. 65), which was denied on October 13, 2009. (App. 63).

REASONS FOR GRANTING THE WRIT

By acting as the finder of facts on the fact-intensive issues of damages arising from a summary judgment proceeding without providing the parties an opportunity to address the issue, much less to notify them that the issue was to be considered, the Wyoming Supreme Court denied Petitioners their due

process rights under Section 1 of the Fourteenth Amendment to the United States Constitution.

I. By Failing to Allow Petitioners Any Notice or Opportunity to Address an Issue Never Raised by The Parties or The Lower Court, The Wyoming Supreme Court's Decision Conflicts With This Court's Decisions on Procedural Due Process

The fundamental requirement of due process is an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the rights for which this Constitutional protection is invoked. *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Due process of law prohibits the judiciary, among others, from the deprivation of property interests without a notice and opportunity to be heard. *Troxel v. Granville*, 530 U.S. 57 (2000). The decision maker must actually consider the evidence and the argument that the party presents. *Brook v. Roadway Exp. Inc.*, 481 U.S. 252 (1987). It follows then that procedural due process is "guaranty of fair procedure". *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

In the instant case, there was no notice "reasonably calculated under all the circumstances" to apprise Stone and Loundagin that the amount or even existence of damages were going to be considered by

the Wyoming Supreme Court. See *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306, 314, 319 (1950). Considering that the lower court's decision on appeal to the Wyoming Supreme Court was for all practical purposes a declaratory judgment as to the enforceability of the Reassignment Clause, and that the nature and extent of the damages was not a basis for the summary judgment on appeal, Stone and Loundagin never had notice much less an opportunity to address the damage issue. This situation is aggravated by the fact that Stone and Loundagin had no notice that an appeal court such as the Wyoming Supreme Court would make evidentiary findings (on damages in particular) as part of its review of the summary judgment.[3] An appellate court is not to decide factual issues, *de novo. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1988). The fact that Stone and Loundagin were not given adequate notice or opportunity to be heard on what ultimately was the decisive issue in the case was not cured by the Wyoming Supreme Court's consideration of Stone and Loundagin's Petition for Rehearing on the damage issue. *Armstrong v. Manzo*, 380 U.S. 545 (1965); see also *Application of Gault*, 387 U.S. 1 (1967). Having denied Stone and Loundagin the opportunity to prove their damages, the remand in

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[3] Since this was a matter governed by Rule 56(c), the threshold consideration was to determine whether there was any "genuine issue as to any material fact". Such determination of the fact intensive issue of damages could not have been determined without at least supporting affidavits or other documents, which were completely absent from the appeal record.

Stone I ultimately proved a foregone conclusion as reflected by the manner in which the appellate-created barrier to proving damages provided the foundation for the decision in *Stone II*.

Stone and Loundagin were deprived of a valuable property interest, namely the ability to drill and develop known coal bed methane deposits having great monetary value. Thus Stone and Loundagin held essentially a reversionary interest in these oil and gas interests that are subject to protection under the Fourteenth Amendment. See generally *Connecticut v. Doehr*, 501 U.S. 1 (1991).

The sufficiency of particular procedures have been considered by applying three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The first factor of the *Mathews* criteria has been addressed above. Regarding the second factor, there simply were no procedures used by the Wyoming Supreme Court relevant to the subject of this Petition. Surprise is not a procedure known for allowing notice

and opportunity to be heard. Rather, there was a complete disregard of procedure. Normally when a fact issue such as the nature and extent of damages arises at the appellate level, the procedure is to remand such an issue to the finder of fact or lower court to allow the requisite notice and opportunity to the parties to address such an unlitigated issue. Indeed, in a summary judgment review, the reviewing court (as well as the trial court) is forbidden to try the issues; it may only determine whether there are issues to be tried. The third factor under *Mathews* concerning the additional burden upon the Government (or courts) would be minimal since remands to the lower court for factual findings are tasks that the court system is already set up for. The manner in which the Wyoming Supreme Court reviewed a discrete issue arising in a partial summary judgment motion, and arrived at a result that was far beyond the issue before it offends traditional notions of fair play and substantial justice. Simply stated, Stone and Loundagin never had their "day in court" on the issue that was used to deprive them of a very valuable property interest. The Wyoming Supreme Court's method of determining the damage issue not properly before it is irreconcilable with essential principles of due process and fair play long recognized by this Court.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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216 P.3d 489, 2009 WY 114

Supreme Court of Wyoming.
David K. STONE and Nicholas B. Loundagin,
Appellants (Plaintiffs),
v.
DEVON ENERGY PRODUCTION COMPANY, L.P.,
and Carpenter & Sons, Inc., Appellees (Defendants).
No. S-08-0267.

Sept. 15, 2009.
Rehearing Denied Oct. 13, 2009.

Representing Appellants: Stephen R. Winship of Winship & Winship, P.C., Casper, Wyoming.

Representing Appellees: Scott P. Klosterman of Williams, Porter, Day & Neville, P.C., Casper, Wyoming.

Before VOIGT, C.J., and GOLDEN, HILL, KITE, and BURKE, JJ.

KITE, Justice.

[¶ 1] David K. Stone and Nicholas B. Loundagin assigned their operating rights under a state oil and gas lease to Devon Energy Production Company, L.P. (Devon) and Carpenter & Sons, Inc. (Carpenter). When Devon and Carpenter did not offer to reassign the operating rights to them six months before the lease expiration date, Mr. Stone and Mr. Loundagin filed an action against them for breach of contract, ejectment, trespass, conversion, an accounting and

injunctive relief. In an appeal certified under W.R.C.P. 54(b)[1] from an order granting summary judgment for Devon and Carpenter on the breach of contract claim, we held that the contract required Devon and Carpenter to make a reassignment offer six months before the lease expiration date, but affirmed the partial summary judgment because we concluded Mr. Stone and Mr. Loundagin could not prove they suffered any damages. *Stone v. Devon Energy Production Co., L.P.*, 2008 WY 49, ¶ 24, 181 P.3d 936, 944 (Wyo.2008) (*Stone I*). While noting that proof of the remaining claims for ejectment, trespass and conversion seemed unlikely, we remanded the case to the district court for a determination as to

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[1] W.R.C.P. 54(b) provides in pertinent part:

> (b) *Judgment upon multiple claims* . . . – When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision . . . which adjudicates fewer than all the claims . . . shall not terminate the action. . . .

An order granting partial summary judgment is not a final, appealable order unless the district court certifies it in accordance with Rule 54(b). *Stewart Title Guaranty Co. v. Tilden*, 2005 WY 53, ¶ 6, 110 P.3d 865, 869 (Wyo.2005). The intent of the rule is to prevent piecemeal appeals. *Olmstead v. Cattle, Inc.*, 541 P.2d 49, 51 (Wyo.1975).

those claims.[2] On remand, the district court granted summary judgment for Devon and Carpenter on the remaining claims. Mr. Stone and Mr. Loundagin appealed.

ISSUES

[¶ 2] The dispositive issue in this case is whether the district court properly granted summary judgment for Devon and Carpenter on the claims for ejectment, specific performance, trespass, conversion, an accounting and injunctive relief.

FACTS

[¶ 3] Mr. Stone acquired a state oil and gas lease covering land located in Johnson County, Wyoming in 1997. He later assigned an undivided 50% of the operating rights under the lease to Stone Exploration, Inc. (SEI) and the other undivided 50% of the operating rights to Mr. Loundagin. SEI and Mr. Loundagin then assigned the "shallow" rights under the lease to Carpenter while reserving an overriding royalty interest in the shallow rights and retaining ownership of the "deep" rights. The letter agreement provided that Carpenter would offer reassignment of

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[2] Mr. Stone and Mr. Loundagin moved for summary judgment on both the breach of contract and ejectment claims. However, the ejectment claim was not addressed at the summary judgment hearing; the summary judgment order addressed only the breach of contract claim.

the operating rights to SEI and Mr. Loundagin one year prior to the expiration of the lease. A document attached to the letter agreement identified the expiration date for the lease as April 2, 2002, the date the primary term ended.

[¶ 4] The parties entered into a supplemental agreement in May of 2000 by which Devon acquired most of the rights previously assigned to Carpenter. Carpenter retained a 10% working interest. The supplemental agreement modified the reassignment clause by requiring Devon and Carpenter to make a reassignment offer not later than six months prior to the expiration of the lease. At the time the parties executed the supplemental agreement, there was no production of oil and gas on the lease and it was set to expire on April 2, 2002.

[¶ 5] Devon and Carpenter did not offer to reassign the operating rights under the lease to Mr. Stone and Mr. Loundagin by October 2, 2001, six months before the lease's primary term was to expire. However, Devon and Carpenter began drilling operations on March 30, 2002, and those operations were being diligently conducted prior to expiration of the primary term. The well was completed and production obtained by mid-April 2002.

[¶ 6] In 2006, with production continuing and Devon and Carpenter still claiming ownership of the shallow rights under the lease, Mr. Stone and Mr. Loundagin filed their complaint for ejectment, specific performance, breach of contract, trespass, conversion,

an accounting and injunctive relief. On the parties' cross motions for summary judgment, the district court granted Devon's and Carpenter's motion for summary judgment on the breach of contract claim. While concluding the reassignment clause required Devon and Carpenter to offer to reassign the operating rights to Mr. Stone and Mr. Loundagin prior to six months before the lease actually expired, the district court held that the obligation to make the offer never arose because the lease term did not expire but was extended by the drilling operations that occurred prior to the end of the lease term.

[¶ 7] In *Stone I,* we affirmed the summary judgment on the breach of contract claim but reached that result for different reasons than the district court. We agreed that the reassignment clause required Devon and Carpenter to make the reassignment offer by October 2, 2001, six months before the lease expiration date. *Stone I,* ¶ 19, 181 P.3d at 942. However, we did not agree that the drilling operations after the expiration date extinguished the reassignment obligation retroactively. We held that the district court erred in its interpretation of the reassignment clause, however, we affirmed the summary judgment because we concluded Mr. Stone and Mr. Loundagin could not show they were damaged by the breach given that the lease never terminated and they continued to enjoy the benefit of the bargain, e.g. the timely payment of overriding royalties due under the lease. *Id.* ¶¶ 20, 24, 181 P.3d at 942-44.

[¶ 8] Addressing the remaining claims in *Stone I*, ¶ 26, 181 P.3d at 944, we said:

> With respect to the remaining claims for ejectment, trespass and conversion, it seems clear from the limited record before us that they, like the damages, cannot be established. Throughout the contractual relationship, Devon has held the right to drill and produce from the lands subject to the lease. The reassignment clause was intended to give Mr. Stone and Mr. Loundagin the right to reassignment of the operating rights in the event it appeared the lease was going to be lost. It was not lost and Devon was operating properly as the working interest owner under the terms of the assignment. It, therefore, seems unlikely that the assignors can prove the elements of ejectment, trespass and conversion because each of these claims requires proof that Devon wrongfully entered and exercised dominion over the property to the exclusion of the assignors. However, the district court has not addressed these claims and we remand this matter for that purpose.

[¶ 9] Back in district court, the parties again filed cross motions for summary judgment on the remaining claims. After a hearing, the district court entered an order granting Devon's motion. Mr. Stone and Mr. Loundagin appealed.

STANDARD OF REVIEW

[¶ 10] Our review of the district court's order is governed by the same standards we applied in *Stone I:*

> When reviewing an order granting summary judgment, we consider the record *de novo.* Our review of orders granting summary judgment is governed by W.R.C.P. 56(c), which provides in pertinent part:
>
> > The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> >
> > We view the evidence in the light most favorable to the party opposing the motion and give that party the benefit of all favorable inferences which may be fairly drawn from the record. A genuine issue of material fact exists when a disputed fact, if proven, would have the effect of establishing or refuting an essential element of an asserted cause of action or defense. We interpret unambiguous contracts as a matter of law.

Stone I, ¶ 9, 181 P.3d at 940 (citations omitted).

DISCUSSION

[¶ 11] Mr. Stone and Mr. Loundagin contend that our decision in *Stone I* revived their claims for ejectment, specific performance, trespass, conversion, an accounting, and injunctive relief. They argue that, by holding that Devon breached the contract and remanding the other claims to the district court, this Court concluded in *Stone I* that the contract ended when the reassignment offer was not made by October 2, 2001, and Devon did not have the right after that date to possess or commence drilling operations. Mr. Stone and Mr. Loundagin assert that they had the right after October 2, 2001, to possess and develop the lease and, by retaining possession and going ahead with drilling operations, Devon unlawfully kept them out of possession. Thus, they contend, the district court erred in granting summary judgment on their ejectment, trespass and conversion claims, all of which required them to prove only that they had a right to the property in question and Devon wrongfully kept them from possession.

[¶ 12] Devon presents various arguments in response, including: 1) this appeal is moot because, while they now assert that the claims for ejectment, trespass and conversion were effectively resolved by the partial summary judgment order, Mr. Stone and Mr. Loundagin failed in *Stone I* to raise any claim of error involving those claims, and argued instead only the breach of contract claim; 2) this Court's decision

in *Stone I* is the law of the case and statements therein to the effect that Devon, as the working interest owner, acted properly in drilling and producing the lease are dispositive of the present claims; and 3) the district court correctly concluded that no genuine issue of material fact existed on the present claims because Mr. Stone and Mr. Loundagin could not show they had the right to possession of the lease and Devon illegally possessed it.

[¶ 13] We conclude that the district court properly granted Devon's and Carpenter's motion for summary judgment although we arrive at that result for slightly different reasons than those advanced by the parties. *Stone I* came to this Court upon the district court's certification under Rule 54(b) that there was no just reason for delay, meaning that the summary judgment order constituted a final judgment even though it did not address all of the claims. Out of an abundance of caution, this Court remanded the case to the district court despite the certification that it constituted a final judgment because it was clear from the record before us that the summary judgment proceedings focused exclusively on the correct interpretation of the reassignment provision in the supplemental agreement. That was the only issue the parties addressed at the summary judgment hearing and it was the only issue addressed in the district court's decision letter, which stated: "Summary judgment on the issue of interpretation of the relevant portion of the lease and assignment is granted in favor of Defendants."

[¶ 14] It was also clear from the record before us in *Stone I* that the district court intended at the time of its decision letter for the summary judgment order to be a partial, and not a final, order. In a footnote, the district court instructed defense counsel to draft a proposed order granting "partial" summary judgment for Devon for the very reason that resolution of the contract issue might not resolve the entire matter. What was not clear from the record in *Stone I,* but is clear from the record presented in this second appeal, is that defense counsel did as instructed and sent the proposed order to counsel for Mr. Stone and Mr. Loundagin who then revised it to reflect the "finality" of the decision by taking out the word "partial" and including Rule 54(b) certification. Counsel made these revisions because in his words, "from a practical standpoint, the Judge's interpretation of paragraph 6 of the Supplemental Agreement has effectively decided this case." The district court issued the order as revised by counsel for Mr. Stone and Mr. Loundagin.[3]

[¶ 15] Thus, the record currently before this Court reflects that at the time the first summary

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[3] The district court may have issued the revised order despite having instructed defense counsel to prepare a partial summary judgment order because the parties had indicated at the summary judgment hearing that determination of the contract issue likely would assist them in resolving the remaining issues. Upon presentation of the revised order containing the Rule 54(b) certification, the district court may well have thought the parties had in fact resolved the case in its entirety.

judgment order was entered, the parties, including Mr. Stone and Mr. Loundagin, and the district court intended the order to be the final judgment. A district court's determination to certify a case under Rule 54(b) is a discretionary one, and this Court will only reverse such a determination where there is an abuse of discretion. *Wetering v. Eisele,* 682 P.2d 1055, 1059 (Wyo.1984). Given the facts as we now know them, this Court would not have concluded the district court abused its discretion in certifying the case, even if that claim had been made in *Stone I.* The order appealed in *Stone I* was certified to be a final order and the remand to the district court in *Stone I* was improvident.

[¶ 16] Turning to the arguments Mr. Stone and Mr. Loundagin present in this second appeal, we conclude they are without merit. We held in *Stone I* that Devon breached the supplemental agreement when it did not make the reassignment offer by October 2, 2001. We further concluded, however, that the lease never terminated and Devon retained the right to drill and produce the lands subject to the lease. *Id.*, ¶¶ 24, 26, 181 P.3d at 944. The construction Mr. Stone and Mr. Loundagin give to *Stone I,* i.e., that the agreement ended upon the breach and Devon lost its right to possess and develop the lease, ignores this conclusion.

[¶ 17] Wyo. Stat. Ann. § 1-32-202 (LexisNexis 2009), the provision Mr. Stone and Mr. Loundagin rely upon to support their claim for ejectment, provides as follows:

> In an action to recover real property it is sufficient if the plaintiff's petition states that he has a legal estate in and is entitled to possession of the real property . . . and that the defendant unlawfully keeps him out of possession. . . .

Because under *Stone I* Devon retained the right to drill and produce the lands subject to the lease, Mr. Stone and Mr. Loundagin cannot show that they were entitled to possession of those lands or that Devon unlawfully kept them out of possession.

[¶ 18] Their claims for trespass and conversion fail for the same reason. A claim for trespass requires the plaintiff to show that he had the right to take immediate possession at the time of the trespass. *Skane v. Star Valley Ranch Ass'n*, 826 P.2d 266, 268 (Wyo.1992). In an action for conversion, the plaintiff must show:

> (1) he had legal title to the converted property; (2) he either had possession of the property or the right to possess it at the time of the conversion; (3) the defendant exercised dominion over the property in a manner which denied the plaintiff his rights to use and enjoy the property; (4) in those cases where the defendants lawfully, or at least without fault, obtained possession of the property, the plaintiff made some demand for the property's return which the defendant refused; and (5) the plaintiff has suffered damage by the loss of the property.

Johnson v. Reiger, 2004 WY 83, ¶ 27, 93 P.3d 992, 999-1000 (Wyo.2004). Mr. Stone and Mr. Loundagin cannot make the requisite showing to sustain their claims for trespass and conversion. They likewise cannot make the showing required to entitle them to specific performance or injunctive relief. *Stone I* precludes all of these claims. The district court properly granted summary judgment for Devon and Carpenter.

[¶ 19] Affirmed.

STATE OF WYOMING	)	IN THE DISTRICT COURT
	) SS.	
	)	FOURTH JUDICIAL
COUNTY OF JOHNSON	)	DISTRICT
		Civil Action No. CV-2006-0106
DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Plaintiffs, v. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Defendants.	)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Filed Oct. 27, 2008)

THIS MATTER having come before the Court upon *Plaintiffs' Motion for Partial Summary Judgment* and *Defendants' Motion for Summary Judgment* and the Court having reviewed the respective motions, memoranda in support, response and reply briefs, Plaintiffs' supplement, the Wyoming Supreme Court's decision in *Stone v. Devon Energy Prod. Co., LLP.*, 181 P.3d 936, 2008 WY 49 (Wyo. 2008), and heard oral argument from counsel for both parties on September 30, 2008, and otherwise being fully advised in the premises, hereby FINDS that there are

no genuine issues of material fact and ORDERS that Defendants are entitled to summary judgment as a matter of law.

DATED this 27 day of October, 2008.

BY THE COURT:

/s/ John G. Fenn
John G. Fenn
District Court Judge

Approved as to form:

cc /s/ Stephen R. Winship
Stephen R. Winship,
attorney for Plaintiffs

cc /s/ Scott P. Klosterman
Scott P. Klosterman,
attorney for Defendants

THE STATE OF WYOMING
FOURTH JUDICIAL DISTRICT

John G. Fenn
District Judge

[SEAL]

Sheridan County
Courthouse
224 S. Main, Ste. B11J
Sheridan, Wyoming
82801
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October 17, 2008

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DECISION LETTER CROSS-MOTIONS
FOR SUMMARY JUDGMENT
CV 2006-0106

(Filed Oct. 20, 2008)

Counsel:

A hearing was held on September 30, 2008 regarding a number of motions filed by the parties. The hearing was reported. The following motions were heard:

1. **Plaintiff's Motion for Partial Summary Judgment** (July 31, 2008)

a. Memorandum In Support of Plaintiffs' Motion for Partial Summary Judgment (July 31, 2008)

b. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (August 29, 2008)

c. Reply Memorandum to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (September 15, 2008 (fax filed September 11, 2008))

d. Supplement to Plaintiffs' Motion for Partial Summary Judgment (October 15, 2008)

2. **Defendants' Motion for Summary Judgment** (August 1, 2008)

a. Memorandum In Support of Defendants' Motion for Summary Judgment (August 1, 2008)

b. Memorandum in Opposition to Defendants' Motion for Summary Judgment (August 29, 2008)

c. Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (September 12, 2008)

3. **Motion to Strike Defendants' Motion for Summary Judgment and Supporting Memorandum** (August 5, 2008)

a. Withdrawal Motion to Strike (August 7, 2008)

4. **Defendants' Motion to Strike Status Sheet for Lease #97-64** (September 12, 2008)

5. **Motion to Strike Defendants' Exhibits** (August 28, 2008)

This matter is again before the Court having been remanded by the Wyoming Supreme Court. The Court grants Plaintiffs' *Motion to Strike Defendants' Exhibits* M and O. The Court denies *Defendants' Motion to Strike Status Sheet of Lease #97-64.*

The Court having reviewed the record, authorities, arguments and Wyoming Supreme Court's decision (*Stone v. Devon*, 2008 WY 49) finds that there are no genuine issues of material fact and Defendants are entitled to summary judgment as a matter of law.[1]

Counsel for Defendants please draft an order consistent with this decision letter and circulate it pursuant to W.R.C.P. Rule 58.

Sincerely,

/s/ John G. Fenn
District Court Judge

---

[1] No specific bases for the granting of summary judgment is required by the district court. *Baldwin v. Dube*, 751 P.2d 388, 394 (Wyo. 1988); *Centrella v. Morris*, 597 P.2d 958, 962 (Wyo. 1979). After careful consideration and deliberation, the Court specifically elects not to set forth further specific bases.

IN THE SUPREME COURT,
STATE OF WYOMING

April Term, A.D. 2008

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, **Appellants (Plaintiffs),** **v.** **DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC.,** **Appellees (Defendants).**	**S-07-0166 (2008 WY 49)**

ORDER DENYING PETITION FOR REHEARING

(Filed May 20, 2008)

This matter came before the Court upon appellants' "Petition and Brief for Rehearing," filed herein May 7, 2008. Having examined the files and record of the Court and having carefully considered the issues raised in the Brief in Support of Appellants' Petition for Rehearing, the Court finds that the Petition for Rehearing should be denied. It is, therefore,

ORDERED that appellants' Petition for Rehearing, filed herein May 7, 2008, be, and the same hereby is, denied.

DATED this 20th day of May, 2008.

BY THE COURT:

/s/ William U. Hill
WILLIAM U. HILL
Justice

181 P.3d 936, 2008 WY 49

Supreme Court of Wyoming.
David K. STONE and Nicholas B. Loundagin,
Appellants (Plaintiffs),
v.
DEVON ENERGY PRODUCTION COMPANY, L.P.,
and Carpenter & Sons, Inc., Appellees (Defendants).
No. S-07-0166.

April 22, 2008.

Representing Appellants: Stephen R. Winship of Winship & Winship, P.C., Casper, Wyoming.

Representing Appellees: Scott P. Klosterman of Williams, Porter, Day & Neville, P.C., Casper, Wyoming.

Before VOIGT, C.J., and GOLDEN, HILL, KITE, and BURKE, JJ.

KITE, Justice.

[¶ 1] David K. Stone and Nicholas B. Loundagin owned operating rights under a state oil and gas lease which they assigned to Devon Energy Production Company, L.P. (Devon) and Carpenter & Sons, Inc. (Carpenter). After Devon and Carpenter failed to offer to reassign the operating rights to them six months before the lease expiration date, Mr. Stone and Mr. Loundagin filed a complaint asserting that Devon and Carpenter breached the assignment contract and should be ejected from the leasehold. In addition, they pleaded trespass and conversion, and sought an accounting and injunctive relief. The

district court granted partial summary judgment for Devon and Carpenter on the breach of contract claim, concluding that the lease had not expired and the reassignment obligation was never triggered. We hold the district court's interpretation of the reassignment clause was in error, but affirm the partial summary judgment order because, under the particular circumstances, no contract damages can be proven.

ISSUES

[¶ 2] The following issue is determinative of this appeal:

> Whether the district court properly granted summary judgment for Devon and Carpenter on the ground that the supplemental agreement did not require them to make an offer of reassignment by October 2, 2001.

FACTS

[¶ 3] In April of 1997, a state oil and gas lease covering land located in Johnson County, Wyoming was issued to Mr. Stone. The lease provided that it would remain in effect for a primary term of five years and so long thereafter as oil, gas and associated hydrocarbons were produced from the lands in paying quantities and that it could be extended beyond the primary term absent production as provided by Wyoming law. The lease further provided that if drilling, completion, testing or reworking operations were being diligently conducted during the primary

or an extended term, the lease would continue in effect so long as such operations continued and as long thereafter as oil and gas were being produced in paying quantities.

[¶ 4] A year and a half after the lease was issued, Mr. Stone assigned an undivided 50% of the operating rights under the lease to Stone Exploration, Inc. (SEI) and the other undivided 50% of the operating rights to Mr. Loundagin. SEI and Mr. Loundagin then assigned the "shallow" rights (from the surface down 1,000 feet) under the lease to Carpenter. Carpenter drafted a letter agreement effective February 1, 2000, memorializing the terms of the assignment from SEI and Mr. Loundagin. In exchange for the shallow rights, Carpenter agreed to pay a bonus payment of nearly $165,000. SEI and Mr. Loundagin reserved an overriding royalty interest in the shallow rights and retained ownership of the "deep" rights (below 1,000 feet). The letter agreement provided that: "'Carpenter' shall offer reassignment of the operating rights to 'Stone' one year prior to the expiration of each lease."[1] A document identified as Exhibit A was attached to the letter agreement listing the leases and their "expiration" dates. The expiration date for the state lease was identified on

---

[1] The letter agreement referred to "the expiration of *each* lease" rather than "the expiration of *the* lease" because with the assignment of the state lease, SEI and Mr. Loundagin also assigned a number of federal leases to Carpenter. The federal leases are not at issue in the present case.

Exhibit A as April 2, 2002, the date the primary term ended.

[¶ 5] In May of 2000, the parties entered into a supplemental agreement by which Devon acquired most of the rights that SEI and Mr. Loundagin previously had assigned to Carpenter. Carpenter retained a 10% working interest. The supplemental agreement modified and amended parts of the letter agreement, including the provision in the original agreement requiring Carpenter to offer to reassign the operating rights one year prior to expiration of the lease. The reassignment clause in the supplemental agreement provided:

> 6. All assignments naming Devon as provided for in this Supplemental Agreement shall, in addition provide that the said Assignee and its successors and assigns shall offer in writing to Stone Exploration, Inc. for the benefit of the Assignor, a reassignment of all its rights under any of the leases and lands referred to herein *not later than 6 months prior to the expiration of each such lease.*

(Emphasis added.) At the time the parties executed the supplemental agreement, there was no production of oil and gas on the lease and it was set to expire on April 2, 2002.

[¶ 6] Devon and Carpenter did not make an offer, written or otherwise, to reassign the operating rights under the lease to SEI and Mr. Loundagin by October 2, 2001, six months before the lease's

primary term was to expire. In December of 2001, Mr. Stone wrote a letter to Devon referencing paragraph 6 of the supplemental agreement, advising that the lease expiration date was less than four months away and asking for compliance with the agreement. Devon responded by letter a month later, stating in pertinent part:

> Clearly the intent of the agreement and this paragraph in particular is to prevent the leases from expiring. Devon acquired the oil and gas leases with the intent of developing them for coalbed methane production. The paragraph in this agreement is often used to provide the assignor with the option to take reassignment of the oil and gas lease in the event the assignee is not going to drill a well or take some other action which would prevent the lease from expiring.
>
> Devon Energy Production Company, L.P. (Devon) intends to take some action to prevent the lease from expiring. As a result, the lease will not expire on April 2, 2002 and, therefore, notice to Stone Exploration, Inc. and the reassignment offer was not due at this time. A[t] such time as we anticipate expiration of the lease, Devon will comply with the terms of Paragraph 6.

It is undisputed that Devon began drilling operations on March 30, 2002, and such operations were being diligently conducted prior to expiration of the primary term. The well was completed and production obtained by mid-April 2002.

[¶ 7] In 2006, with production continuing and Devon and Carpenter still claiming ownership of the shallow rights under the lease, Mr. Stone and Mr. Loundagin filed a complaint for ejectment, specific performance, breach of contract, trespass, conversion, an accounting and injunctive relief. Devon and Carpenter answered the complaint, generally denying the claims and asserting that the term of the lease had been extended before the primary term ended so they were not required to make a reassignment offer.

[¶ 8] Mr. Stone and Mr. Loundagin filed a motion for partial summary judgment in which they asserted that no genuine issues of material fact existed on their ejectment and breach of contract claims and they were entitled to judgment as a matter of law on those claims. Devon and Carpenter filed a response in which they reiterated their claim that the lease had never expired because drilling operations commenced before the end of the primary term and, therefore, their obligation to offer to reassign the operating rights was not triggered.[2] At the summary

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[2] Devon and Carpenter attached a number of exhibits without supporting affidavits to their summary judgment response. Mr. Stone and Mr. Loundagin moved to strike the exhibits and the district court granted their motion. Devon and Carpenter did not appeal the district court's ruling and so the question of whether the exhibits were properly stricken is not before us. Regardless, the parties are in agreement that the reassignment clause is clear and unambiguous, meaning consideration of other evidence is unnecessary to determine the parties' intent.

judgment hearing, Devon and Carpenter orally moved for summary judgment in their favor on the breach of contract claim. By order dated July 9, 2007, the court granted Devon's and Carpenter's motion and denied Mr. Stone's and Mr. Loundagin's summary judgment motion on their breach of contract and ejectment claims and certified the matter pursuant to Rule 54(b).

STANDARD OF REVIEW

[¶ 9] Our review of the district court's order is governed by the following standards:

> When reviewing an order granting summary judgment, we consider the record *de novo*. Our review of orders granting summary judgment is governed by W.R.C.P. 56(c), which provides in pertinent part:
>
> > The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> We view the evidence in the light most favorable to the party opposing the motion and give that party the benefit of all favorable inferences which may be fairly drawn from the record. A genuine issue of material fact exists when a disputed fact, if

> proven, would have the effect of establishing or refuting an essential element of an asserted cause of action or defense. We interpret unambiguous contracts as a matter of law.

Christensen v. Christensen, 2008 WY 10, ¶ 11, 176 P.3d 626, 629 (Wyo.2008) (citations omitted.)

DISCUSSION

[¶ 10] The district court concluded the language of the supplemental agreement clearly and unambiguously required Devon and Carpenter to make an offer to reassign the operating rights to Mr. Stone and Mr. Loundagin prior to six months before the lease actually expired. The district court further concluded, however, that the obligation to make the offer never arose because the lease term did not expire. The district court declined to read the reassignment clause as requiring an offer of reassignment before six months prior to the expiration date of each such lease. The district court concluded instead that the term "expiration" in the reassignment clause must be considered in light of the lease terms which allowed the lease to be extended in several ways. The district court concluded, as long as the lease had not expired and continued in full force and effect by virtue of production, an extension, or drilling, completion, testing or reworking operations during the primary term or under an extension, Devon and Carpenter were under no obligation to make a reassignment offer.

[¶ 11] Mr. Stone and Mr. Loundagin claim that the district court's ruling ignores the intent of the parties and the six month deadline expressly provided for in the agreement. They assert that the district court improperly considered extrinsic evidence, i.e. the lease, to reach the conclusion that, contrary to the express language of the reassignment clause, Devon and Carpenter were not required to make a reassignment offer by October 2, 2001, if they intended to drill before the lease expired. By its ruling, they contend, the district court in effect modified the written agreement after the fact by interpreting it on the basis of what happened after the six month deadline had come and gone. They assert the effect of the district court's ruling was to write the six month deadline out of the agreement.

[¶ 12] Devon and Carpenter assert that the term "expiration" must be given its plain and ordinary meaning; pursuant to its terms, the lease could be extended in various ways; drilling operations were under way before the primary term expired and the term of the lease had been extended; therefore, the lease did not expire and the obligation to offer reassignment was not triggered.

[¶ 13] From the parties' and our own research, it seems there are no cases involving a reassignment clause like the one at issue here. *See* Howard R. Williams & Charles J. Meyers, *Oil and Gas,* § 428.2 (2002). As one legal commentator has noted:

> [The reassignment clause] is a most dangerous provision. There are unknown facets to it, for there are relatively few court decisions construing it. . . . It is a clause which should be insisted upon by every assignor of a lease who reserves an overriding royalty . . . , and it is a clause which should be restricted and finely honed by the assignee.

Paul W. Eaton, Jr., *"The Reassignment Provision – Meaningful or Not?"* 20 Rocky Mountain Mineral Law Institute 601.

[¶ 14] Reassignment clauses are almost exclusively found in the oil and gas arena and, while there is no set language used, many such clauses require a reassignment offer only in the event that the assignee intends to let the lease expire. *Id. Walton v. Atlantic Richfield Co.*, 501 P.2d 802 (Wyo.1972), for example, involved a reassignment clause that provided as follows:

> If assignee shall desire to surrender and release said lease to the [lessor] before said lease terminates by operation of law of the lease terms, Assignee will . . . give notice to Assignor at least thirty (30) days prior to the rental or expiration date, and if within fifteen (15) days thereafter, Assignor . . . shall notify [Assignee] that such lease . . . be reassigned to Assignor, then Assignee will . . . reassign such lease to Assignor . . . ; but, if within such fifteen (15) days from date of notice, Assignor shall fail to notify Assignee that Assignor . . . so desire[s] reassignment,

> Assignee may, if it so desires, surrender to the [lessor] such lease. . . .

See also Tenneco Oil Co. v. Gaffney, 369 F.2d 306 (10th Cir.1966) ("If assignee or his assigns wishes to relinquish this lease at any time, he must offer reassignment to assignor at least sixty (60) days before any rental due date or final expiration date . . . "); *McLaughlin v. Ball,* 431 S.W.2d 305 (Tex.1968) ("Assignee shall always have the right to release and surrender the lease hereby assigned, provided that before releasing or surrendering, and at least sixty (60) days prior to the next rental due, he shall first notify assignor . . . "). Many reassignment clauses also require the assignor to respond to an offer of reassignment within a specified time period or lose the right to reassignment. *Walton,* 501 P.2d at 803.

[¶ 15] The purpose of a reassignment clause has been described as follows:

> In order to understand why the reassignment clause is used, we must keep in mind the established law that in the absence of specific agreement the owner of the working interest, the lessee, owes no duty (except possibly good faith) and has no fiduciary relationship to the holder of an overriding royalty. Without notice or liability to the overriding royalty owner, the lessee may allow the lease to terminate by nonpayment of rentals, by surrender or by failure to drill. The lessee has no duty to preserve the lease or to reassign it to the overriding royalty owner. The overriding royalty owner, then,

> finds himself owning a property interest of some value, and very often an interest of great value, which may expire before the end of the primary term of the lease on account of the action or inaction of the lessee. The continued existence of the interest is nakedly dependent upon the lessee's plans for the lease.
>
> The absence of a duty owed by the lease owner to the overriding royalty owner renders the latter's ownership very precarious, to say the least. As a consequence every assignor of a lease retaining an overriding royalty interest should protect his interest by incorporating a reassignment obligation in the assignment.

Eaton, *supra,* at 603-604.

[¶ 16] In the present case, all parties agreed that the intent of the reassignment clause contained in their agreement was to avoid the loss of the lease. Mr. Stone and Mr. Loundagin assert the clause clearly required Devon and Carpenter to make an offer of reassignment no later than October 2, 2001, six months before the end of the primary term. They claim the six months was necessary to give them time to obtain production before the end of the primary term and avoid loss of the lease. In contrast, Devon and Carpenter claim that they always intended to obtain production before the primary term expired and as long as they carried out that intent they were not required to make the reassignment offer. They cite *Amoco Prod. Co. v. Texaco, Inc.,* 838 So.2d 821,

830 (La.Ct.App.2003) for the proposition that "it is impossible to determine precisely when assigned leases may be lost" because "[u]nlike obligations that arise on a certain date, no exact date can be set when a lease may expire."

[¶ 17] In *Amoco,* the court considered the following reassignment clause:

> In the event that the Assignee should elect to surrender, let expire, abandon or release any or all rights in said lease acreage, or any part thereof, the Assignee shall notify the Assignor not less than sixty (60) days in advance of such surrender, expiration, abandonment or release, and if requested to do so by the Assignor, the Assignee immediately shall reassign such rights in said lease acreage, or such part thereof, to the Assignor.

Id. at 826. Amoco alleged that Texaco breached this clause when it allowed one lease to expire and released other leases without notifying Amoco. Prior to trial, the district court granted a directed verdict in Amoco's favor, finding that reasonable minds could not reach any conclusion other than that no notice was given. Texaco appealed. In addition to the statements referenced by Devon and Carpenter concerning the uncertainty of lease expiration dates, the appellate court made the following observations concerning the importance of reassignment clauses:

> The record establishes reliance on the lease reassignment provisions is the primary vehicle by which an assignor learns that his

> lease is in danger of being lost. All the experts admitted it is customary for oil and gas companies to honor reassignment clauses. However, in this case neither IMC nor Texaco provided Amoco with notice as required by the reassignment clause.

Id. at 830. The court affirmed the district court's finding that reasonable minds could only conclude no notice was provided as required by the reassignment clause.

[¶ 18] With this background in mind, we turn to consideration of the provision before us. In interpreting a written agreement, our primary purpose is to determine the true intent and understanding of the parties at the time and place the agreement was made. *Wells Fargo Bank Wyo., N.A. v. Hodder,* 2006 WY 128, ¶ 21, 144 P.3d 401, 409 (Wyo.2006). We begin our analysis by considering *de novo* the plain language of the agreement. *Id.* We construe the language in the context in which it was written, looking to the surrounding circumstances, the subject matter, and the purpose of the agreement to ascertain the intent of the parties at the time the agreement was made. *Id.*

> We construe the contract as a whole, attempting to avoid a construction which renders a provision meaningless. We strive to reconcile by reasonable interpretation any provisions which apparently conflict before adopting a construction which would nullify any provision.

Id.

[¶ 19] In the present case, the parties and the district court agreed that the reassignment clause is unambiguous. It clearly required Devon and Carpenter to make a reassignment offer not later than six months prior to the expiration of the lease. The difficulty with interpreting the clause to mean actual expiration of the lease as Devon and Carpenter assert is that the lease would have to expire before it could be determined when they were required to make the offer of reassignment. If they had the intent to obtain production and received an extension any time before April 2, 2002, then they would not be required to make a reassignment offer. Under this interpretation, the six month offer would have to be made only after it was clear the lease was going to expire. However, once the lease expired, it would not be possible to offer to reassign the lease six months before it expired.

[¶ 20] We avoid interpreting a contract in a manner rendering any provision meaningless. *Bradley v. Bradley,* 2007 WY 117, ¶ 15, 164 P.3d 537, 542 (Wyo.2007). Consistent with this approach, in *Tenneco,* 369 F.2d at 308, the Tenth Circuit refused to interpret a reassignment provision in a fashion that would have rendered it meaningless. The interpretation advocated by Devon and Carpenter, and accepted by the district court, renders the six month provision meaningless. Interpreting the agreement to mean that the expiration date was entirely dependent upon the assignee's action or inaction after the six month deadline has passed would deprive the

assignor of the protection the provision was intended to provide. We decline to accept that interpretation. We hold that the reassignment clause required Devon and Carpenter to make an offer to reassign the operating rights to Mr. Stone and Mr. Loundagin on or before October 2, 2001.

[¶ 21] This interpretation does not require inserting any words into the reassignment clause. Considering the language of the reassignment clause in the context in which it was written and looking to the surrounding circumstances, the subject matter, and the purpose of the agreement, it is clear that the parties intended the term "expiration" to mean the expiration date of the lease that was contained within the lease itself.[3] The best evidence of that intent is the fact that the parties attached Exhibit A to the letter agreement specifically identifying the state

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[3] Mr. Stone and Mr. Loundagin assert on appeal that the district court's consideration of the lease in interpreting the supplemental agreement was improper. Because all parties agreed that the supplemental agreement was unambiguous, they argue that its meaning must be derived from the four corners of the document and not from what they characterize as extrinsic evidence. To reiterate, we construe contract language in the context in which it was written, looking to the surrounding circumstances, the subject matter, and the purpose of the agreement to ascertain the intent of the parties at the time the agreement was made. *Wells Fargo*, ¶ 21, 144 P.3d at 409. In the context of this case, the lease and the letter agreement are "surrounding circumstances" which must be considered in interpreting the supplemental agreement. The district court did not err in considering the lease.

lease expiration date as April 2, 2002, the date on which the primary term ended. This interpretation is consistent with the underlying purpose of reassignment clauses generally which is to protect assignors against loss of their overriding royalty interest "prior to the anticipated life of the lease, that is, the end of the primary term." Eaton, *supra,* at 617. *See also* James M. Colosky, Chapter 5, Rocky Mountain Mineral Law Institute, *"The Reassignment Provision – The Agony in the Oversight,"* 5-12.

[¶ 22] In rejecting the claim that the reassignment obligation was dependent on the assignees' subjective intent to allow the lease to expire, we find it significant that unlike many of the reassignment clauses quoted by other courts and commentators, the clause these parties drafted and agreed to did not contain language to the effect that a reassignment offer was required "if the assignee desires to surrender the lease." Unlike the provision at issue in *Amoco,* 838 So.2d at 826 ("In the event that the Assignee should elect to surrender, let expire, abandon, or release any or all rights in said lease"), the clause Devon and Carpenter agreed to omitted any language indicating the reassignment obligation was dependent on Devon's and Carpenter's intent. The omission of language that appears to be standard in oil and gas reassignment clauses suggests that, rather than being dependent upon the assignee's intent, the parties intended the reassignment offer to be made on a date certain – prior to six months before the expiration of the lease, or before October 2, 2001.

Had they intended to make the assignees' intent determinative, they could have inserted one of the standard phrases to that effect in the reassignment provision.

[¶ 23] In addition, we note the parties renegotiated the reassignment provision in their supplemental agreement to state that notice was to be given six months prior to expiration rather than one year as the original agreement had provided. Understandably, assignors tend to favor long periods of advance notice to give them more time to start drilling within the primary term and assignees would prefer short notice periods so they can hold the lease as long as possible before tendering it back. Eaton, *supra,* at 612. This renegotiation of the notice date indicates Devon and Carpenter wanted control of the operating rights for a longer period before having to make the reassignment offer and that the parties were well aware of the date that would trigger the reassignment obligation.

[¶ 24] On the basis of this analysis, we hold the district court's interpretation of the contract was in error. However, we can affirm a district court's summary judgment order on any basis apparent in the record. *Stewart Title Guaranty Co. v. Tilden,* 2005 WY 53, ¶ 22, 110 P.3d 865, 874 n. 7 (Wyo.2005). Here, Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of contract. In an action for breach of contract, the plaintiff is entitled to such damages as would put him in the same position as if the contract

had been performed, less proper deductions. *Capshaw v. Schieck,* 2002 WY 54, ¶ 10, 44 P.3d 47, 52 (Wyo.2002). Contract damages, like tort damages, are intended to compensate the plaintiff for his loss. *Horn v. Wooser,* 2007 WY 120, ¶ 17, 165 P.3d 69, 73 (Wyo.2007). Accordingly, where the plaintiff has suffered no loss, there are no damages. In the relatively few cases involving oil and gas lease reassignment clauses, courts have unanimously held that the measure of damages for breach of the clause is the value of the lease *at the time the lease terminates.* Eaton, *supra,* at 614. *See also,* Colosky, *supra,* at 5-29. In *Tenneco,* 369 F.2d at 309, the Tenth Circuit held that damages for failure to reassign were measured by the market value of the lease when it terminated, and not any earlier time. Here, the lease never terminated and thus, Mr. Stone and Mr. Loundagin incurred no damages. They have continued to enjoy the benefit of their bargain, e.g. the timely payment of all overriding royalties due under the lease. We have found no case in which the overriding royalty owner was deemed to have been damaged by a failure to reassign when the lease did not terminate. This is not surprising since the fundamental purpose of the reassignment clause is to protect the overriding royalty interest holder from termination of the lease – no termination, no damage.

[¶ 25] This result does not mean Mr. Stone and Mr. Loundagin had no means of enforcing the reassignment clause. If, at the time of their demand for re-assignment, they had sought injunctive relief or

specific performance and had been able to prove the necessary requirements for such relief, the district court could have ordered the reassignment. However, having failed to seek that relief, and Devon having performed its obligation to maintain the lease and pay the overriding royalties when due, Mr. Stone and Mr. Loundagin are not now entitled to relief. The reassignment clause was intended to provide them sufficient time to drill a well or otherwise extend the lease during its primary term, not to allow the overriding royalty interest owners to reacquire the lease after production was obtained. We affirm the district court's partial summary judgment order on the basis that, as a matter of law, Mr. Stone and Mr. Loundagin cannot show that they were damaged. The lease was not lost and they have received the overriding royalty payments due under the agreement.

[¶ 26] With respect to the remaining claims for ejectment, trespass and conversion, it seems clear from the limited record before us that they, like the damages, cannot be established. Throughout the contractual relationship, Devon has held the right to drill and produce from the lands subject to the lease. The reassignment clause was intended to give Mr. Stone and Mr. Loundagin the right to reassignment of the operating rights in the event it appeared the lease was going to be lost. It was not lost and Devon was operating properly as the working interest owner under the terms of the assignment. It, therefore, seems unlikely that the assignors can prove the elements of ejectment, trespass and conversion because

each of these claims requires proof that Devon wrongfully entered and exercised dominion over the property to the exclusion of the assignors. However, the district court has not addressed these claims and we remand this matter for that purpose.

[¶ 27] The partial summary judgment on breach of contract is affirmed and the matter is remanded for consideration of the remaining claims.

GOLDEN, Justice, dissenting.

[¶ 28] I respectfully dissent. The supplemental agreement at issue required Devon and Carpenter to offer reassignment of all pertinent acquired rights under the lease to SEI "not later than 6 months prior to the expiration of each such lease." The majority opinion concludes the parties intended the end of the primary term of the lease to be the equivalent of the "expiration" of the lease. While understandable that a date certain for "expiration" would be desirable, I do not believe it is our judicial function to supply a date that the parties themselves did not agree upon. It would have been a simple matter for the parties to have specified the end of the primary term of the lease as the trigger for the reassignment clause, but they did not do so. They agreed that the reassignment clause would be triggered by the "expiration" of the lease.

[¶ 29] The primary goal of this Court in construing contracts is to discern and honor the intent of

the parties. I agree that the intent of the parties in including the reassignment provision was to prevent the lease from expiring without giving SEI the opportunity to save it. I do not believe the intent of the parties can be fulfilled by substituting "end of the primary term" for "expiration." Such construction is contrary to the interests of all the parties.

[¶ 30] It is contrary to SEI's interests because it would provide SEI with only one opportunity to save the lease – based entirely upon the date of the end of the primary term of the lease. Devon and Carpenter would have had no contractual obligation to provide SEI with the opportunity to save the lease should they have allowed the lease to expire before the end of the primary term by non-payment of rent or other inappropriate action or inaction. Further, by the language of the reassignment provision as construed in the majority opinion, the provision would lapse after the primary term of the lease. Should SEI have chosen not to force reassignment at that time, Devon and Carpenter would have no further contractual obligation to offer to reassign the lease.[4] It is doubtful

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[4] As reflected in paragraph 6 of the majority opinion, SEI did make a request for reassignment under the reassignment provision in December 2001. However, after Devon's reply that it had no intention of allowing the lease to expire, the record does not reflect any follow up by SEI with a further demand until this suit was filed in November 2006. Even if I were to agree with the majority opinion's construction of the reassignment provision, I would still uphold the grant of summary judgment

(Continued on following page)

SEI entered into the supplemental agreement with the intent of accepting such a situation.

[¶ 31] As for Devon and Carpenter, requiring the reassignment provision to be triggered by the date of the end of the primary term potentially seriously threatens their respective interests in the lease. The provision is mandatory. SEI could demand reassignment of the lease without any regard for what could have been significant investment by Devon and Carpenter. It is unlikely Devon and Carpenter would have accepted such a risk from the outset.

[¶ 32] The majority opinion expresses concern that, without a time certain, the reassignment provision would be rendered meaningless. I disagree. That does not mean that I agree with the district court to the extent its decision can be read to suggest the trigger for the reassignment provision is the actual expiration of the lease. Rather, as I read it, and with knowledge that parties to a contract are bound by an implied duty of good faith and fair dealing, the reassignment provision is triggered by knowledge that events will occur that will result in expiration of the lease.

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because SEI waived enforcement of the provision as it pertains to the end of the primary term.

[¶ 33] The lease is clear on the events that could cause the lease to expire. For instance:

> Section 2. TERM OF LEASE. This lease shall become effective on the day and year set out below and shall remain in effect for a primary term of five (5) years and for so long thereafter as leased substances may be produced from the lands in paying quantities. This lease may also be extended beyond its primary term in the absence of production of leased substances as may be provided by the statutes of the State of Wyoming and the regulations of the Board of Land Commissioners adopted pursuant thereto. Provided, however, if drilling, completion, testing or reworking operations are being diligently conducted, either during the primary term or during any extension thereof, this lease shall continue in full force and effect so long as such operations are being conducted and so long thereafter as oil or gas may be produced in paying quantities. This lease may be relinquished or terminated at an earlier date as herein provided.

The lease also provides for an annual rental payment. The existence of events that would cause the lease to expire pursuant to the terms of the lease generally do not happen overnight.

[¶ 34] In the instant case, for example, Devon and Carpenter were well aware of the date of the end of the primary term. Because of the amount of foundation work that needs to be done before production

can begin, they almost certainly would have known six months prior to that date if they would be able to hold the lease by means of production or as otherwise provided by law. If, at that time, they had not been diligently working towards production, or even more obviously, if they had no intention of holding the lease, then the reassignment clause would have been triggered. Likewise, in the future, Devon and Carpenter most likely will have advance knowledge of when their operations are such that the lease will expire. With that knowledge, they then are bound to comply with the reassignment provision.

[¶ 35] Devon and Carpenter must allow SEI an opportunity to save the lease when they know their actions will not be enough to do so. By focusing on the practical, as versus theoretical, "expiration" of the lease, I believe the reassignment provision imposes such a requirement. I do not believe the reassignment provision was included in the supplemental agreement with the intention of granting SEI a potential windfall. I therefore would uphold the grant of summary judgment to Devon and Carpenter.

STATE OF WYOMING COUNTY OF JOHNSON	) ss.)	IN THE DISTRICT COURT FOURTH JUDICIAL DISTRICT
DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Plaintiffs, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Defendants.	)	Civil Action No. CV-2006-0106

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 9, 2007)

THIS MATTER having come before the Court on April 30, 2007 upon the Plaintiffs' Motion for Partial Summary Judgment on Counts I and III of their Complaint and the Defendants having orally moved for summary judgment at the hearing on this matter; and the Court having reviewed the respective briefs of the parties and after hearing the oral arguments of counsel for both parties on April 30, 2007, and otherwise being fully advised in the premises, FINDS with respect to the interpretation of the contractual language, "six months prior to the expiration of each

such lease" contained in Paragraph 6 of the parties' Supplemental Agreement Modifying the Letter Agreement dated February 17, 2000 ("Supplemental Agreement") that no genuine issue of material fact exists and based on said determination, as more particularly set forth in the Court's Decision Letter dated June 14, 2007, which is incorporated herein by this reference, the Defendants did not breach the Supplemental Agreement by failing to offer to reassign the subject lease interests to Plaintiffs.

NOW, THEREFORE IT IS HEREBY ORDERED that summary judgment is hereby granted in favor of Defendants, Devon Energy Production Company, L.P. and Carpenter & Sons, Inc., on the interpretation of said key contractual issue and Plaintiffs' Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED AND DERTERMINED [sic] that, pursuant to 54(b) W.R.C.P., this Order effectively determines all the other claims for relief asserted in the Plaintiffs' complaint, and there being no just reason for delay, the Court hereby directs that this Order be entered in the record of this Court as a final judgment in favor of Defendants in this case.

DATED this 9 day of July, 2007.

BY THE COURT:

By: /s/ JGF
John G. Fenn
District Court Judge

Approved as to form:

/s/ Scott P. Klosterman
Scott P. Klosterman,
Attorney for Defendants

/s/ Stephen R. Winship
Stephen R. Winship,
Attorney for Plaintiffs

THE STATE OF WYOMING
FOURTH JUDICIAL DISTRICT

[SEAL]

John G. Fenn
District Judge

Sheridan County Courthouse
224 S. Main, Ste. B11J
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June 14, 2007

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DECISION LETTER
CV 2006-0106

Counsel:

A hearing was held on April 30, 2007 regarding a number of motions filed by the parties. The motions included:

1. Plaintiffs' Motion for Partial Summary Judgment along with accompanying memorandum, Defendants' Response, and Plaintiffs' Reply

2. Plaintiffs' Motion to Strike Defendants' Exhibits

3. Defendants' Motion to Strike Plaintiffs' Traverse and Affidavit of Nicholas B. Loundagin

At the hearing, all parties took the position that there were no material questions of fact with respect to interpretation of the key contractual provisions. Defendants had not filed a written motion for summary judgment. However, Defendants did so orally at the hearing without objection by the Plaintiffs.

Plaintiffs' Motion to Strike Defendants' Exhibits

In order to properly rule on the summary judgment issues, a determination first must be made as to what evidence of record the Court should consider. Evidence which is relied upon to sustain or defeat a summary judgment must be such as would be admissible evidence. *Hunter v. Farmers Ins. Group*, 554 P.2d 1239 (Wyo. 1976); *Equality Bank v. Suomi*, 836 P.2d 325 (Wyo. 1992). Plaintiffs argue that several of the exhibits submitted by Defendants in response to partial summary judgment are inadmissible hearsay and therefore should be stricken from the record.[1] The exhibits were attached to Defendants' Response without supporting affidavits setting forth basic

[1] Defendants did not file a written response to the Motion to Strike Defendants' Exhibits. At the hearing, Defense counsel argued that the Court can take judicial notice that the submitted exhibits are admissible under W.R.E. 803 exceptions. The Court declines to do such. The Court notes that there were certain exhibits offered by the Defendants which may not be admissible but were not objected to by Plaintiffs. Therefore, the Court deems that Plaintiffs waived any objection regarding admissibility of the attached exhibits except as raised in their Motion to Strike. W.R.E. Rule 103.

foundation regarding the exhibits. The Court rules on the individual exhibits as follows:

EXHIBIT NO.	DESCRIPTION	RULING
D	Letter Devon to Carpenter Dated April 25, 2000	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
H	Letter Devon to Office of State Lands & Investments Dated June 13, 2000	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
I	Letter Office of State Lands and Investments to Devon Dated September 1, 2000	Inadmissible Hearsay – 801(c).
N	Letter Devon to Office of State Lands and Investments Dated December 20, 2000	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
O	Surface Use Agreement Tear Drop Cattle Company & Devon Dated December 21, 2000	Admissible – "Verbal Act".

P	Letter Office of State Land and Investments to Devon Dated May 23, 2001	Inadmissible Hearsay – 801(c).
Q	Letter Devon to Winship Dated June 19, 2001	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
R	Letter Devon to Winship Dated July 26, 2001	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
S	Letter Winship to Devon Dated September 4, 2001	Admissible – 801(d)(2) Admission by Party-Opponent.
T	Letter/Contract Devon and Stone Dated October 5, 2001	Admissible – Verbal Act and 801(d)(2) Admission by Party-Opponent.
V	Letter Devon to Office of State Lands and Investments Dated November 13, 2001	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
Y	Letter Devon to Stone Dated January 17, 2002	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.

AA	Letter Office of State Lands and Investments to Devon Dated March 7, 2002	Inadmissible Hearsay – 801(c).
DD	Letter Devon to State Lands and Investments Dated March 26, 2002	Inadmissible Hearsay – 801(d)(2) Statement is by Devon being offered by Devon.
EE	Letter Office of State Lands and Investments to Devon Dated March 17, 2002	Inadmissible Hearsay – 801(c).
FF	Letter Office of State Lands and Investments to Devon Dated March 28, 2007	Inadmissible Hearsay – 801(c).
HH	Letter Rose to Winship Dated November 13, 2002	Inadmissible Hearsay – 801(c).

The Court grants Plaintiffs' Motion to Strike regarding the above exhibits identified as being inadmissible and does not rely on such in consideration of the motion for partial summary judgment.

Defendants' Motion to Strike Plaintiffs' Traverse and Affidavit of Nicholas B. Loundagin

Plaintiffs filed their Motion for Partial Summary Judgment on March 1, 2007. Defendants timely filed their response on March 20, 2007. Plaintiffs filed a Memorandum in Traverse to Defendants' Response to Plaintiffs' Motion for Summary Judgment along with an Affidavit of Nicholas B. Loundagin on April 24, 2007. Defendants filed a Motion to Strike Plaintiffs' Traverse and Affidavit of Nicholas B. Loundagin on April 27, 2007.

In Defendants' Motion to Strike, they argue that Plaintiffs' reply was filed after the 15 day period allowed under W.R.C.P. Rule 6(c). W.R.C.P. Rule 6 provides unless the Courts [sic] permits otherwise, a party affected by the motion may serve a response, together with affidavits, at least three days prior to the hearing or within 20 days after service of the motion, **whichever is earlier**. The moving party may serve a reply, if any, at least one day prior to the hearing on the motion or within 15 days after service of the response, **whichever is earlier**. Plaintiffs did not timely file a reply within the 15 day period.

W.R.C.P. Rule 6(c) also states: "Any party may serve supplemental memoranda or rebuttal affidavits at least one day prior to the hearing on the motion." Plaintiffs argue that they should be allowed to file their Memorandum in Traverse to Defendants' Response to Plaintiffs' Motion for Summary Judgment

along with the Loundagin Affidavit based on this last sentence.

> The Wyoming Supreme Court has articulated:
>
> > The patient asserts that, when the district court rescheduled the hearing date, the deadlines imposed by W.R.C.P. 6(c)(1) also changed. The patient misinterprets this rule. An order which rescheduled a hearing and was entered after the responsive documents were due does not extend the response period. ***The patient relies on the language in W.R.C.P. 6(c)(1) which allows "supplemental memoranda or rebuttal affidavits at least one day prior to the hearing." This, of course, assumes that adequate opposing materials were timely filed in the first place.***
>
> *Weber v. McCoy*, 950 P.2d 548, 553 (Wyo. 1997) (emphasis added).
>
> > A district court does not abuse its discretion when it refuses to accept out-of-time affidavits. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure Civil 3d § 2719, at 321-22, n. 22 (1998).
>
> *Johnson v. Creager*, 2003 WY 110, ¶6, 76 P.3d 799, 802 (Wyo. 2003).

Plaintiffs failed to timely file a reply with supporting affidavits within the 15 day period provided by the rule and provide no explanation for the

untimeliness. As the Wyoming Supreme Court has articulated, the sentence allowing the filing of supplemental memoranda or rebuttal affidavits assumes that other materials have been timely filed in the first place. This last sentence of the rule should not be allowed to extend the deadlines set forth for filing the respective response and reply filings. Therefore, the Court within its discretion grants Defendants' Motion to Strike Plaintiffs' Traverse and Affidavit of Nicholas B. Loundagin and does not rely on such in consideration of the Motion for Partial Summary Judgment.

Reassignment Clause

Through a series of negotiations and contractual documents, Plaintiffs assigned interests in an Oil and Gas Lease with the State of Wyoming to the Defendants. The means in which the parties ultimately reached the assignment of the leasehold interests is not in dispute by the parties. The critical portion of the contractual documents between the parties is contained in a "Supplemental Agreement" which states:

> All assignments naming Devon as provided for in this Supplemental Agreement shall, in addition provide that the said Assignee and its successors and assigns shall offer in writing to Stone Exploration, Inc. for the benefit of the Assignor, a reassignment of all its rights under any of the leases and lands referred to herein not later than 6 months prior to the expiration of each such lease.

The parties contend that the language is unambiguous and has a clear meaning. However, the parties express different interpretations of the unambiguous language. Differing interpretations of a contract alone do not constitute ambiguity requiring extrinsic evidence. *Caballo Coal Company v. Fidelity Exploration & Production Company*, 2004 WY 6, ¶10-11, 84 P.3d 311 (Wyo. 2004); *Hickman v. Groves*, 71 P.3d 256, 257 (Wyo. 2003).

> Assignments are contracts and are construed according to the rules of contract interpretation. The determination of the parties' intent is our prime focus in interpreting or construing a contract. If an agreement is in writing and its language is clear and unambiguous, the parties' intention is to be secured from the words of the agreement. When the agreement's language is clear and unambiguous, we consider the writing as a whole, taking into account relationships between various parts. In interpreting unambiguous contracts involving mineral interests, we have consistently looked to surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract.

Hickman at ¶ 6 (emphasis deleted). The terms of the contract must first be examined and given their plain and ordinary meaning. Plain meaning is that "meaning which the language would convey to a reasonable person at the time and place of its use." *Id.*

Plaintiffs somewhat summarily assert that the key language refers to the "primary term" of the lease. Thus, Plaintiffs argue the "primary term" of the lease expired on April 2, 2002 and Defendants had a contractual obligation to reassign the lease sixth months prior to the expiration of the primary term – November 2, 2001 (sic). (At the hearing, Plaintiffs conceded that they had incorrectly calculated the six months and agreed that the proper date is actually October 2, 2001.) However, Plaintiffs' position does not recognize numerous means in which the lease may continue beyond the primary term. In fact, the lease has not expired and continues to be in effect.[2] Had the parties intended the reassignment to occur six months prior to the "expiration of the primary term" they could have easily expressed such. They did not. Rather, the parties specifically used the term "6 months prior to the expiration of each such lease." To accept Plaintiffs' argument, the Court must insert reference to the end of the primary term as being the expiration of the lease and ignore the other

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[2] At the hearing, the Court inquired of the Defendants as to what admissible evidence existed of record to support the assertion that the lease continues to be in effect particularly given Plaintiffs Motion to Strike and lack of affidavits filed by Defendants. The Defendants referred to numerous paragraphs of the Complaint as establishing that the lease continues to be in effect. Plaintiffs' counsel did not contend otherwise. Rather, Plaintiffs argued that the ongoing lease should be reassigned to them. Based on such representations and the arguments from all the parties, the Court excepts the representations that the lease has not expired.

means in which the lease may continue beyond the primary term.

The focus is on the term **"expiration of each such lease"**. When reading such language along with Section 2 of the State of Wyoming Oil and Gas Lease which states in relevant part:

> This lease shall become effective on the day and year set out below and shall remain in effect for a primary term of five (5) years and for so long thereafter as leased substances may be produced from the lands in paying quantities. This lease may also be extended beyond its primary term in the absence of production of leased substances as may be provided by the statutes of the State of Wyoming and the regulations of the Board of Land Commissioners adopted pursuant thereto. Provided, however, if drilling, completion, testing or reworking operations are being diligently conducted, either during the primary term or during any extension thereof, this lease shall continue in full force and effect so long as such operations are being conducted and so long thereafter as oil and gas may be produced in pay quantities.

Plaintiffs' argument fails to recognize the clear terms of the underlying lease allowing for its extension beyond the primary term. *Black's Legal Dictionary 7th Ed.* defines expiration as "a coming to an end; a formal termination of a closing date." Applying the plain meaning of the term "expiration" requires the lease to have expired which has not occurred.

Additionally, the reassignment provisions are imposed upon the Defendants during the entire term of the lease. For example, if the lease is extended beyond the primary term and Defendants then fail to take necessary action to continue the lease, they have an obligation to reassign six months prior to the expiration of the lease whenever that may occur. Plaintiffs' interpretation fails to recognize obligations to reassign the lease after the primary term. Again, the lease allows for numerous means of extending the lease beyond the primary term. The reassignment provisions are beneficial to Plaintiffs during such extended periods. The Plaintiffs' position ignores such additional benefits and does not give meaning to the other terms of the contract. *Cf. Avatar Exploration, Inc. V. Chevron, U.S.A., Inc.*, 933 F.2d 314, 318 (5th Cir. 1991) fnt. 3.; *Atlantic Refining Co. v. Moxely*, 211 F.2d 916, 920 (5th Cir. 1954).

Plaintiffs argue that Defendants' interpretation requires the lease to actually expire which does not give effect to the intended meaning of the reassignment provision such that they have an opportunity to save the lease within the six month period and that such interpretation would limit them to speculative damage claims against the Defendants once the lease has expired. Indeed, the language likely requires retrospective analysis to determine whether the Defendants have breached the contract since the lease must expire before the date upon which the six month reassignment requirement can be determined. However, this does not preclude Plaintiffs a remedy for

breach of contract should such a breach occur, and therefore, does not render Defendants' interpretation invalid.

Procedurally, Defendants did not specifically move for summary judgment or partial summary judgment. However, at hearing, the parties agreed that interpretation of the key contract provisions were a matter of law and that neither of them were attempting to overcome or argue that summary judgment would be improper due to the existence of a material question of fact. The Court specifically inquired of Plaintiffs' counsel their position regarding Defendants lack of filing a motion for summary judgment. Plaintiffs' counsel represented to the Court that it would not be necessary for the Court to hold a separate subsequent hearing to address a written summary judgment motion filed by the Defendants, and therefore, did not oppose the Court entering summary judgment in favor of the Defendants if that was the Court's legal interpretation of the contract provisions.

While the Defendants set forth a number of arguments in support of their position including expressed intent of terminating the lease, attempted reformation, impossibility, and contra proferentum (if the Court determines that the term is ambiguous), the Court finds that the term of the contract at issue is unambiguous. The contract requires reassignment six months prior to the expiration of the lease. The lease has not expired and therefore, Defendants were not required to reassign the lease at the end of the

primary term under the unambiguous terms of the contract. However, the obligation of reassignment by the Defendants continues and Defendants are required to offer reassignment six months prior to the expiration of the lease whenever that may occur.

Summary judgment on the issue of interpretation of the relevant portion of the lease and assignment is granted in favor of Defendants. Defendants' counsel will prepare and circulate an order pursuant to W.R.C.P. Rule 58.[3]

Sincerely,

John G. Fenn
District Court Judge

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[3] This may not conclude this matter. Therefore, the order should be for partial summary judgment in favor of Defendants. However, the parties indicated during the hearing that determination of this legal issue would likely assist the parties in resolving any remaining issues by stipulaltion [sic] or settlement. If such efforts are not successful, the parties need to renew their request for a scheduling conference.

IN THE SUPREME COURT,
STATE OF WYOMING

October Term, A.D. 2009

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, **Appellants (Plaintiffs),** **v.** **DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC.,** **Appellees (Defendants).**	**S-08-0267 (2009 WY 114)**

ORDER DENYING PETITION FOR REHEARING

(Filed Oct. 13, 2009)

This matter came before the Court upon appellants' "Petition for Rehearing," e-filed herein September 30, 2009. Having examined the files and record of the Court and having carefully considered the issues raised in the Petition for Rehearing, the Court finds that the Petition for Rehearing should be denied. It s [sic], therefore,

ORDERED that the Petition for Rehearing, filed herein September 30, 2009, be, and the same hereby is, denied.

DATED this 13th day of October, 2009.

BY THE COURT:

/s/ Barton R. Voigt
BARTON R. VOIGT
Chief Justice

IN THE SUPREME COURT FOR THE STATE OF WYOMING

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Appellants (Plaintiffs), v. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Appellees (Defendants).	)	No. S-08-0267

PETITION FOR REHEARING

COME NOW the above named Appellants, by and through their counsel, and pursuant to W.R.A.P. 9.07 petition the Court to rehear that portion of the case dealing with the following issues, or to remand these issues to the lower court, and in support hereof shows the Court as follows:

I. Specific Performance

The decision in *Stone Energy Production Company, L.P. et. al v. Devon et. al*, 2009 WY 114 ("*Stone II*") does not review or address all claims for relief in Plaintiff-Appellants' complaint. Specifically, Count II of Plaintiffs' complaint (R. 3-4) requested specific enforcement of the Supplemental Agreement's reassignment provision. Considering this Court's decision

regarding the finding of a lack of any damages, this form of relief appears to be especially appropriate.

In *Stone et. al v. Devon Energy Production Company*, 2008 WY 49 ("*Stone I*"), this Court reviewed the district court's interpretation of said reassignment provision in the context of a summary judgment on just the breach of contract claim in Plaintiffs' complaint. This Court explained in *Stone II*, that while "Devon breached the supplemental agreement when it did not make the reassignment offer by October 2, 2001" (¶16), it found that as to the breach of contract claim, "Mr. Stone and Mr. Loundagin could not show they were damaged by the breach given that the lease never terminated and they continued to enjoy the benefit of the bargain, e.g. the timely payment of the overriding royalties due under the lease" (¶7).

This Court affirmed the summary judgment on the specific enforcement claim because Stone and Loundagin "cannot make the requisite showing to sustain their claims for trespass or conversion. They *likewise* cannot make the showing required to entitle them to specific performance . . . " (¶18) (emphasis added) However, a "showing" of specific performance involves entirely different elements of proof than trespass and conversion:

(1) "There is a valid binding contract"

(2) "The facts and special equities of the situation demand such relief"

(3) " . . . Damages for breach are an inadequate and impractical remedy under the circumstances of the case".

Rainbow Oil Co. v. Christman, 656 P.3d 538, 545 (Wyo. 1982). "The object in such cases [specific performance] is to place the party without fault in as nearly the same position as he would have been had there been no default by the other party. The guiding principle in such cases is *to relate the contract back to the date set therein.*" *Ekberg v. Sharp*, 76 P.3d 1250, 1257 (Wyo. 2003) (citations omitted) (emphasis added).

It would appear that Stone and Loundagin have met those elements of a specific performance claim in a manner sufficient to overcome a motion for summary judgment, especially since this Court has now found that damages of any sort could not be proven. Neither the district court's summary judgment has or this Court's decision appear to have addressed why the above elements for enforcement of a claim for specific performance were not met by Stone and Loundagin. (Certainly this Court did not mean that the elements of a specific performance claim are the same as for trespass and conversion.)

The reconsideration of the Devon's breach of the contract from the perspective of specific performance would help moderate the seemingly conflicting effect the *Stone* decisions have on such decisions as *Knapp v. Landex Corp.*, 130 P.3d 924 (Wyo. 2006) and *Cotton*

v. McCulloh, 125 P.3d 252 (Wyo. 2005). Specifically this Court held in *Knapp* that:

> . . . [I]f, upon the face of a contract, it clearly appears to have been the distinct understanding and agreement of the parties that if a stipulated act was not performed within a specified time certain consequences were to follow; and if default has been made in the performance within the time, a court of equity will give no relief unless a strict performance was either waived by the party entitled to its benefits or is excused on some special ground of equitable cognizance.

130 P.3d at 928.

In the instant case, there was no modification of the reassignment provision agreed to by the parties. Nor can there have been a waiver (a fact intensive issue not susceptible to summary judgment) considering the written protests of David Stone to Devon (R. 295). In *Keaver v. Payless Auto Sales, Inc.*, 79 P.3d 469, 500 (Wyo. 2003), this Court found that "[a] contract modification requires the same mutual assent necessary for the formation of the initial contract". Perhaps most troubling in reconciling the *Stone* decisions with Wyoming case law is presented by the example of long held contract law represented by *Cotton*, 125 P.3d at 263 (Wyo. 2005) that "[a] unilateral disregard of the terms of a contract will not vary the requirements of the contract . . . ".

In their current posture, the *Stone* decisions could be interpreted such that a unilateral modification or

disregard of a contract is now permissible under Wyoming law, even without a finding of waiver or new consideration. In other words, a breaching party can "unbreach" the contract without the non breaching parties' consent. Modifying *Stone II* to address Stone and Loungagin's [sic] claim for specific performance could alleviate such misinterpretation of the principles of law to be derived from the *Stone* decisions.

II. "Benefit of the Bargain"

There appears to be a factual error that affects one of the basis premises of the decision in the above appeal. The reassignment provision in the supplemental agreement required Devon to reassign the State Lease operating rights to Stone Exploration Inc. ("SEI"). SEI, for all times relevant was an independent oil and gas exploration and production corporation. However, it had no royalty interests related to the State Lease (nor did David Stone or Nicholas Loundagin). Indeed David Stone is not even a party to the subject agreements with Devon and Carpenter. SEI's consideration for its part of the agreement was the upfront payment of $616,032 for all of the subject lease rights. It was long after the reassignment of the State Lease was required by Devon that David Stone took an assignment of SEI's rights and obligations under the supplemental agreement. Further, the royalty interests were in existence long before the relevant agreements with Devon and Carpenter were entered into. In other words, those royalty interests

(or the protection thereof) were not the consideration for SEI in either agreement. It appears therefore that the distinction between SEI and David Stone has been overlooked or blurred. Since the lack of damages based on a "benefit of the bargain" concept is the primary basis for the *Stone* decisions, this Court should allow a rehearing to ensure the decisions are not based on a factual error.

It should also be noted that the purpose of the reassignment provision, although never spelled out in the agreements, was not so much to protect royalties but to allow for the development of the known (and very valuable) coal bed methane deposits (R. 293 at ¶14).

WHEREFORE Appellants request that this Court grant a rehearing on the above issues or to remand the issues to the lower court.

DATED this 30th day of September, 2009.

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN

By: /s/ *Stephen R. Winship*

Stephen R. Winship
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CERTIFICATE OF SERVICE

I, Stephen R. Winship, hereby certify that a true and correct copy of the foregoing **Petition for Rehearing** was served upon the following, by depositing copies thereof in the United States mail, postage prepaid, this 30th day of September, 2009.

Scott P. Klosterman
Richard E. Day
Williams, Porter, Day & Neville
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Casper, WY 82602

/s/ Stephen R. Winship
Stephen R. Winship

IN THE SUPREME COURT FOR THE STATE OF WYOMING

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Appellants, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Appellees.	)	No. S-07-0166

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

COUNSEL FOR APPELLANTS

Stephen R. Winship
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COMES NOW the above named Plaintiff-Appellants (collectively referred to as "Stone") and in support of their Petition for Rehearing submit this memorandum:

A. Contract Damages are Determined as of the Date of the Breach

After determining that Appellee, Devon Energy Production Company, L.P. ("Devon") had breached the parties' agreement to reassign to Stone the operating rights to the subject lease, this Court nevertheless affirmed the lower court's summary judgment decision on the basis that no damages could be proven by Stone. Even though no damage issue was raised as part of the appeal or in the lower court, this Court relied upon its power to affirm or disaffirm, on any basis apparent in the record on appeal, the judgment or final order of the lower court.

In order to conclude that Stone has not suffered any damage, this Court determined that (1) the intention of all parties regarding the language of paragraph 6 of the subject agreement was only to protect and prevent the loss of the overriding royalty interests (which had previously been assigned to non-parties). *Id.* at ¶24; and (2) damages for this breach are to be measured as of the date of the expiration of the subject lease. *Id.*

In deciding an issue of first impression for Wyoming, this Court holds that the damages arising from a breach of the terms of a reassignment clause in an oil and gas lease agreement, are determined as of the date of the lease expiration rather than the date of the contract breach. (Six months before the expiration date). This decision appears to affect a fundamental change in the determination of breach of

contract damages. More precisely the decision could be interpreted as reversing, *sub silentio*, this Court's decision in *Sagebrush Dev. v. Moehrke*, 604 P.2d 198, 204 (1979), which held that "[d]amages are measured as of the date of the breach". The *Moehrke* standard appears to be an almost universally accepted standard reflecting long accepted common law precedent for determining the date as of which breach of contract damages are determined. See 22 *Am. Jur. 2d*, Damages §78 at 113 (2003):

> Damages for a breach of contract are to be determined as of the time of the occurrence of the breach, with interest to the date of judgment and not from a prior date. Under this rule, later events such as fluctuations in value after the breach do not affect the measure of damages.

Determining the breach of contract damages as of the date of the breach in the contractual instant case, rather than at some later time, allows the lower court to consider the loss by Stone of the right to utilize the operating rights to develop the State Lease (and not just to preserve their "deep rights" and the overriding royalty). While not in the record on appeal, the operating rights to the State Lease were quite valuable even as of the date they were to be reassigned. Indeed the reassignment clause of the parties' agreement requires the reassignment of the operating rights rather than some other action that might be construed to intend only the preservation of the override.

This situation is akin to an option agreement or a sublease in that the failure to timely perform terminates the rights of the holder of the option as to the subject of the contract or lease at the deadline specified therein. This approach is also consistent with this Court's holding in this case that " . . . the parties intended the reassignment offer to be made on a date certain" ¶22. As this Court's decision now reads, it effectively awards Devon for its breach of the parties' contract. Further the decision goes beyond the limited summary judgment issues on appeal to decide the damage issues relevant to the remaining count when there was never any evidence or argument as to these other claims.

This Court's decision looks to Paul W. Eaton, Jr., *"The Reassignment Provision – Meaningful or Not?"* 20 Rocky Mountain Mineral Law Institute 601, 617. However that law review article was reviewing the "subjective intent" type of reassignment clauses that this Court earlier in its decision repudiated since they were relevant only to a reassignment clause that was based on the lessee's intent as to the expiration of the lease. More importantly the Eaton article relies upon *Tennaco Oil Co. v. Gaffney*, 369 F.2d 306 (10th Cir. 1966) as authority for the proposition that the date for damage determination is the date of lease expiration. However *Gaffney* actually holds, consistent with *Moehrke*, that, "[t]he proper *measure of damages* was the value of the property at the time the deed ought to have been delivered . . . " *Id.* at 309. See also *Piroschak v. Whelan*, 106 P.3d 887, 893 (Wyo. 2005).

However, unlike the land sale contract cases which measure the "benefit of the bargain" damages only in monetary terms, the subject reassignment clause contemplated the redelivery to Stone of the operating rights and the lease itself as of October, 2001. In other words the parties' agreement unambiguously provides that Stone would have the right to develop the oil and gas interests as of October 1, 2001 and not as of the lease expiration date of April 2, 2002.

This Court's decision rejects the subjective intent approach employed in other cases and the law review articles in its interpretation of the reassignment agreement at issue, and yet seemingly later revives and adopts this subjective intent position in determining the parties' damages when it holds that damages in this case will be determined as of the lease expiration date rather than the date of the contractual breach.

B. The Parties did not have an Opportunity to Address Damages.

The issue of whether Stone suffered any damages by reason of Devon's breach was never argued or briefed before this Court or the lower court. More importantly, there is nothing in the record on appeal regarding this fact intensive issue. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); See also *Brock v. Roadway Exp. Inc.*, 481 U.S.

252 (1987). Such an opportunity should now be allowed as part of the remand to the lower court.

If this matter had been litigated in the lower court or argued before this Court, Stone's position would have been, using the objective language of the reassignment clause (rather than Devon's subjective interpretation), that the operating rights and all other rights under the State Lease should have been delivered by Devon as of October 2, 2001. In other words, all damages must be measured from the date of the breach, because the parties' bargained that from that date Stone would be allowed to develop the oil and gas interests of the State Lease.[1]

C. Conclusion

Appellants petition this Court to amend its remand to the lower court so as to allow it to consider all damages incurred by Appellees' breach of the reassignment agreement arising as of the date that reassignment of the operating rights to the State lease should have been tendered – October 2, 2001. Further the remand should be clarified to allow Count II (specific performance) of Plaintiffs' Complaint to be determined by the lower court. Alternatively this Court should clarify its remand that its decision

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[1] Although probably *dicta*, this Court's comment regarding its anticipation that, on remand, ejectment damages cannot be proven (¶26) appears to overlook the mesne profits attendant to successful ejectment claims. See *Brown v. Grady*, 92 P. 622 (Wyo. 1907); *Dumas v. Ropp*, 558 P.2d 632 (Idaho 1977).

addresses only those damages arising from Count III (breach of contract) of Plaintiffs' Complaint.

DATED this 6th day of May, 2008.

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN

By: /s/ Stephen R. Winship
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CERTIFICATE OF SERVICE

I, Stephen R. Winship, hereby certify that a true and correct copy of the foregoing **Brief in Support of Appellants' Petition for Rehearing** was served upon the following, by depositing copies thereof in the United States mail, postage prepaid, this 6th day of May, 2008.

Scott P. Klosterman
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/s/ Stephen R. Winship
Stephen R. Winship

IN THE SUPREME COURT FOR THE STATE OF WYOMING

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Appellants, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Appellees.	)	No. S-07-0166

PETITION FOR REHEARING

COMES NOW the above named Appellants, by and through their counsel, and pursuant to W.R.A.P. 9.07 petition the Court to rehear that portion of the case dealing with Appellants' damages, or to remand all damage issues to the lower court and in support hereof shows the Court as follows:

1. Breach of contract damages are to be determined as of the date of the contract breach.

2. There is nothing in the record on appeal regarding Appellants' breach of contract damages or other kinds of damages suffered by Plaintiff, and thus Appellants did not have an opportunity to be heard at a meaningful time and in a meaningful manner regarding damage issues.

3. The Court's remand to the lower court failed to reference or include a remand of Count II of the Plaintiff's complaint (specific performance).

WHEREFORE Appellants request this Court grant a rehearing on damages or amend its remand to the lower court to allow the issue of Appellants' damages and Count II of Plaintiffs' Complaint to be addressed.

DATED this 6th day of May, 2008.

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN

By: /s/ Stephen R. Winship

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/s/ Stephen R. Winship
Stephen R. Winship

STATE OF WYOMING)
) SS.
COUNTY OF JOHNSON)

IN THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Civil Action No. CV-2006-0106

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN,
Plaintiffs,

v.

DEVON ENERGY PRODUCTION COMPANY, L.P., and
CARPENTER & SONS, INC.,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW Defendants, Devon Energy Production Company, L.P. ("Devon Energy") and Carpenter & Sons, Inc., ("Carpenter") by and through their attorneys, Scott P. Klosterman and Richard E. Day of Williams, Porter, Day & Neville, P.C., and respectfully submit the following response to Plaintiffs' Motion for Partial Summary Judgment.

I. SUMMARY OF THE ARGUMENT

Plaintiffs Stone Exploration, Inc. and Nicholas B. Loundagin alleged that Devon Energy and Carpenter breached the Supplemental Agreement Modifying Letter Agreement Dated February 17, 2000, by failing to offer a reassignment of State of Wyoming Oil and Gas Lease No. 97-00064 on or before November 2, 2001. Plaintiffs further aver that Devon Energy and Carpenter are unlawfully in possession of the leasehold, and that they no longer have any right, title or interest in the lease.

Disposition of Plaintiffs' claims of breach of contract and ejectment turn on the proper reading of State of Wyoming Oil and Gas Lease No. 97-00064 and the Supplemental Agreement Modifying Letter Agreement Dated February 17, 2000. The language of the lease as well as the language of the supplemental agreement is clear and unambiguous. Upon considering these two contracts, it is clear that what the parties intended was to define their respective rights and obligations in the event that Devon Energy intended to let State of Wyoming Oil and Gas Lease No. 97-00064 expire. The use of the term "expiration" is not ambiguous because the lease clearly contemplates the potential for a lease to expire other than just at the end of the primary term. Furthermore, the lease clearly provides that the lease may be continued or extended as provided by the statutes of the State of Wyoming. It is also clear that the six (6) month time requirement set forth in the reassignment provision was designed to give

Plaintiffs adequate time to prevent expiration of the lease should Devon Energy intend to let it expire.

The undisputed evidence in this case is that Devon Energy never intended to let State of Wyoming Oil and Gas Lease No. 97-00064 expire and in fact the lease has never expired. Where a promise is conditional, the condition precedent must occur before such a promise is enforceable. Where, as here, the condition requiring Devon Energy to reassign State of Wyoming Oil and Gas Lease No. 97-00064 never occurred, Plaintiffs claim for breach of contract and ejectment fail as a matter of law. Moreover, even if we were to assume that the reassignment provision was applicable, it would have been impossible for Devon Energy to reassign State of Wyoming Oil and Gas Lease No. 97-

* * *

v. PRI Environmental, Inc., 2001 WY 55, ¶ 10, 25 P.3d 511, ¶ 10 (Wyo. 2001). In cases requiring the interpretation of a contract, summary judgment is appropriate only if the contract is clear and unambiguous. *Kirkwood v. CUNA Mutual Insurance Society*, 937 P.2d 206, 208 (Wyo. 1997); *Treemont, Inc. v. Hawley*, 886 P.2d 589, 592 (Wyo. 1994).

IV. ARGUMENT

A. Reassignment Provision

The Supplemental Agreement Modifying the Letter Agreement Dated February 17, 2000 contains the following reassignment provision:

> All assignments naming Devon Energy as provided for in the Supplemental Agreement shall, in addition provide that the said Assignee and its successors and assigns shall offer in writing to Stone Exploration, Inc. for the benefit of Assignor, a **reassignment** of all its rights under any of the leases and lands referred to herein not later than 6 months prior to the **expiration** of each such lease.

(See, **Exhibit "E"** at p. 3, ¶ 6) (Emphasis added).

It is well known in the oil and gas industry that the purpose of a reassignment provision is to require the lessee to maintain the lease in full force and effect or reassign it to the lessor. If the lessee chooses not to do what is required to maintain the lease, it must offer the lessor the opportunity to save the lease before it expires. *Frankel v. Exxon Mobil Corp.*, 923 So.2d 55, 75 (La. App. 2005).

State of Wyoming Oil and Gas Lease No. 97-00064 was for a five (5) year primary term commencing April 2, 1997. (See, **Exhibit "A"** at p. 1). "Primary term" is defined as that period of time during which a lease may be kept alive by a lessee even though there is not production in paying quantities by virtue of drilling operations on the leased lands or the payment of rentals. WILLIAMS & MEYERS, *Oil and Gas Law*, Vol. 8 at p. 826 (2005). The primary term shall expire upon any anniversary date of the lease during its primary term, unless the lessee either pays the annual rental then due or commences

the operations for the drilling of a well prior to each such anniversary date. *Id.* Any year during the primary term when the lessee does not **either** commence operations or pay the annual rental he will lose the lease; i.e. it will expire. *Id.*

As a prudent operator, Devon Energy took a number of affirmative steps which establish its intent to keep State of Wyoming Oil and Gas Lease No. 97-00064 in full force and effect. For example, by December 21, 2000, Devon Energy had already entered into a Surface Use Agreement with the surface owner over State of Wyoming Oil and Gas Lease No. 97-00064 in order to plan development of the lease and conduct surveys required to obtain drilling permits. (See, **Exhibit "O"**). In addition, annual rentals were paid on or before the anniversary date for State of Wyoming Oil and Gas Lease No. 97-00064 in 1997, 1998, 1999, 2000, 2001 and 2002. (See, **Exhibit "HH"**). Specifically, Devon Energy paid the annual rental for the year 2001, evidencing its intent to keep State of Wyoming Oil and Gas Lease No. 97-00064 in full force and effect from April 2, 2001, through April 2, 2002. On February 7, 2002, Devon Energy filed and was granted an Application for Permit to Drill the State Stranahan 34G-1698 well which is located on State of Wyoming Oil and Gas Lease No. 97-00064. (See, **Exhibit "Z"**). Furthermore, on March 27, 2002, Devon Energy obtained a one year extension of Wyoming Oil and Gas Lease No. 97-00064 from the Office of State Lands and Investments pursuant to the Rules and Regulations

of the Board of Land Commissioners – Chapter 18, Section 8(b). (See, **Exhibits "EE"** and **"FF"**). Finally, by March 30, 2002, Devon Energy had spud the State Stranahan 34G-1698 well and continued drilling the well into the extended period until completed. (See, **Exhibit "GG"**).

The undisputed facts in this case establish that Devon Energy and Carpenter, as lessees of Wyoming Oil and Gas Lease No. 97-00064, maintained the lease in full force and effect and never let it expire. Consequently, the reassignment provision contained in the Supplemental Agreement was never triggered. The reassignment provision was specifically conditioned on Devon Energy's determination to let the lease expire. It is axiomatic that when fulfillment of a promise is conditional upon the occurrence of a specified event or contingency, the occurrence of that event or contingency is essential to the duty to perform. "It is true that it is often said that a condition precedent must be exactly performed or fulfilled before a promise, dependent thereon, can be enforced." *Pacific-Wyoming Oil Co. v. Carter Oil Co.*, 226 P. 193, 198, 31 Wyo. 314 (Wyo. 1924). Contrary to Plaintiffs' contention, the reassignment provision did not have the effect of conferring on Plaintiffs a right of reassignment of State of Wyoming Oil and Gas Lease No. 97-00064 when Devon Energy never intended to let the lease expire or in fact let the lease expire. In the absence of a contractual duty, no liability against Devon Energy and Carpenter can arise.

Plaintiffs assert that State of Wyoming Oil and Gas Lease No. 97-00064 "was to expire on April 2, 2002 . . . and each Defendant had an affirmative duty to turn over all their interests in said State Lease to Plaintiffs, effective as of November 2, 2001." (See, *Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment* at pp. 4-5). Initially it should be noted that six months prior to April 2, 2002, is not November 2, 2001, but rather October 2, 2001. More importantly, Plaintiffs' interpretation of the reassignment provision is fatally flawed because it fails to recognize that the "expiration" language found in the Supplemental Agreement is tied to circumstances contemplated in State of Wyoming Oil and Gas Lease No. 97-00064.

State of Wyoming Oil and Gas Lease No. 97-00064 clearly contemplates the possibility that the lease may expire for multiple reasons at various time periods, not just at the end of the primary term. For example, if Devon Energy and Carpenter had elected not to commence drilling operations or pay the annual rental that was due on or before April 2, 2001, State of Wyoming Oil and Gas Lease No. 97-00064 would have expired on April 2, 2001. Another example is if Devon Energy and Carpenter had drilled a well and obtained production sometime during the primary term but were unable to establish a satisfactory market, they could seek a suspension of the lease and pay an annual rental of $2.00 per acre or fraction thereof. If Devon Energy and Carpenter elected not to pay the annual rental, the lease would

expire. This scenario could occur before or after the end of the primary term.

State of Wyoming Oil and Gas Lease No. 97-00064 also clearly provides for the possibility that the lease may be extended or continued beyond the primary term by "drilling over" or "as may be provided by the statutes of the State of Wyoming and the regulations of the Board of Land Commissioners adopted pursuant thereto." (See, **Exhibit "A"** at p. 1). Yet, Plaintiffs' interpretation of the reassignment provision would render meaningless this express contractual provision. An oil and gas lease is a contract that must be construed under the doctrines applicable to contracts. *State v. Moncrief*, 720 P.2d 470, 473 (Wyo. 1986) (citing *Kuehne v. Samedan Oil Corp.*, 626 P.2d 1035 (Wyo. 1981)). This Court must construe State of Wyoming Oil and Gas Lease No. 97-00064 as a whole, attempting to avoid a construction which renders a provision meaningless. *Wells Fargo Bank v. Hodder*, 2006 WY 128, ¶ 21, 144 P.3d 401 (Wyo. 2006) (citing *Hickman v. Groves*, 2003 WY 76, ¶ 7, 71 P.3d 256, 258 (Wyo. 2003)).

Nothing in the reassignment provision indicated an intent of the parties to expand the rights of reassignment beyond the occurrence of one event – an intent by Devon Energy to let State of Wyoming Oil and Gas Lease No. 97-00064 expire. The foregoing interpretation comports with the terms of the lease, as well as the language of the Supplemental Agreement and does not involve this Court re-writing either contract or reaching a strained interpretation

of the meaning of the language. The use of the term "expiration" in the reassignment provision is clear, unambiguous and not capable of more than one reasonable interpretation. *Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1056 (Wyo. 2002). The express language of State of Wyoming Oil and Gas Lease No. 97-00064 and the Supplemental Agreement belies Plaintiffs' claim that a reassignment obligation arose in this case when Devon Energy never intended or let State of Wyoming Oil and Gas Lease No. 97-00064 expire.

B. Attempted Reformation

One can only wonder why Plaintiffs failed to advise this Court of the Affidavit and Notice of Oil and Gas Lease Reassignment Obligations they filed in the lands records of Johnson, County, Wyoming on March 12, 2002. One can also wonder why Plaintiffs' counsel failed to produce the Affidavit and Notice of Oil and Gas Lease Reassignment Obligations in discovery. Finally, one can wonder why Plaintiffs filed the Affidavit and Notice of Oil and Gas Lease Reassignment Obligation yet in their current motion advise this Court that the Supplemental Agreement is clear and unambiguous.

It is apparent that the reason Plaintiffs have failed to mention the Affidavit and Notice of Oil and Gas Lease Reassignment Obligations in their motion and failed to produce such document in discovery is because it establishes an admission by Plaintiffs that

"expiration" of the lease is **NOT** limited to the end of the primary term. The Affidavit and Notice of Oil and Gas Lease Assignment recognizes the possibility of an "extension of the lease term **thereafter** established by reason of production **or by law.**" (See, **Exhibit "CC"** at p. 2, ¶ B) (Emphasis added). In this case, Devon Energy obtained an extension of Wyoming and Gas Lease No. 97-00064 by operation of law.

It is also apparent that the reason Plaintiffs filed the Affidavit and Notice of Oil and Gas Lease Reassignment Obligation over five (5) years ago in the land records of Johnson County, Wyoming was an attempt to try and reform the Supplemental Agreement.

A court may reform a written contract upon clear and convincing evidence if the following elements are met: (1) a meeting of the minds – a mutual understanding between the parties prior to the time a writing is entered into; (2) a written contract; and (3) which does not conform to the understanding, by reason of mutual mistake. *Tbland v. Key Bank of Wyoming*, 847 P.2d 549, 554 (Wyo. 1993); *Gasaway v. Reiter*, 736 P.2d 749, 751 (Wyo. 1987); *Crompton v. Bruce*, 669 P.2d 930, 934 (Wyo. 1983). Clear and convincing evidence is defined as "that kind of proof which would persuade the trier of fact that the truth of the contention is highly probable." *MacGuire v. Harriscope Broadcasting Co.*, 612 P.2d 830, 839 (Wyo. 1980); *Story v. State Bd. of Medical Examiners*, 721 P.2d 1013, 1014 (Wyo. 1986).

Reformation must reflect the parties' intent and cannot represent only one party's subjective understanding of the intent of the agreement. *Mathis v. Wendling*, 962 P.2d 160, 164 (Wyo. 1998). Plaintiffs have failed to establish by clear and convincing evidence a mutual mistake by the parties that was erroneously included in the Supplemental Agreement. Therefore the equitable remedy of reformation is inapplicable.

C. Lack of Ambiguity

Plaintiffs attempt to create in hindsight a dispute as to the meaning of the reassignment provision does not render the provision ambiguous. *Svalina v. Split Rock Land and Cattle Company*, 816 P.2d 878, 881 (Wyo. 1991). However, if this Court should find that the reassignment provision in the Supplemental Agreement is ambiguous, it must be construed "most strongly against" the scrivener. *Kelliher v. Herman*, 701 P.2d 1157, 1159 n. 1 (Wyo. 1985). Here, Plaintiffs' counsel drafted the Supplemental Agreement and therefore it must be construed most strongly against Plaintiffs.

D. Impossibility to Timely Reassign Lease

Assuming, *arguendo*, that Devon Energy was obligated to reassign State of Wyoming Oil and Gas Lease No. 97-00064 under the facts of this case, this Court must consider whether Devon Energy could have reassigned the lease six (6) months prior to April

2, 2002. As set forth in Section II above, the assignment of State of Wyoming Oil and Gas Lease No. 97-00064 from Stone Exploration, Inc. and Nicholas B. Loundagin to Devon Energy was not approved by the Office of State Lands & Investments until March 7, 2002, approximately three (3) weeks prior to April 2, 2002. (See, **Exhibit "AA"**). The delay in approval of State of Wyoming Oil and Gas Lease No. 97-00064 was through no fault of Devon Energy by [sic] rather the result of various requirements imposed by Plaintiffs. More importantly, the assignment from Stone Exploration, Inc. and Nicholas B. Loundagin to Devon Energy includes the following provision: "**[a]ssignments are not valid until approved by the Director**, Office of State Lands and Investments as per State Oil and Gas Lease Terms." (See, **Exhibit "AA"** at p. 2) (Emphasis added). On October 2, 2001, six (6) months prior to April 2, 2002, Plaintiffs had yet to execute the final revised assignment nor had it been approved by the Office of State Lands and Investments. Accordingly, it would have been impossible for Devon Energy to reassign State of Wyoming Oil and Gas Lease No. 97-00064 to Plaintiffs, assuming such an obligation existed.

V. CONCLUSION

For all of the reasons set forth above, Defendants Devon Energy Production Company, L.P. and Carpenter & Sons, Inc. respectfully request that this Court deny Plaintiffs' motion for partial summary judgment and find that the right of reassignment

provision was never triggered under the facts of this case.

DATED this 19th day of March, 2007.

DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Defendants

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STATE OF WYOMING)
) ss.
COUNTY OF JOHNSON)

IN THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Plaintiffs, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Defendant.	)	Civil Action No. CV-2006-0106

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Mar. 1, 2007)

COME NOW the above-named Plaintiffs, by and through their counsel, and in support of their Motion for Partial Summary Judgment shows the Court as follows:

I. FACTUAL BACKGROUND

In February, 2000, Defendant Carpenter & Sons, Inc. (hereinafter "Carpenter") acquired the right and option to purchase certain leasehold rights in and to, *inter alia*, Wyoming Oil and Gas Lease No. 97-00064

(hereinafter the "State Lease") and other leases not herein involved. The holders of the oil and gas operating/working interest rights under said State Lease were Stone Exploration, Inc. and Nicholas B. Loundagin. This transaction was reflected by the written agreement (the "Original Agreement") attached as *Exhibit 1* to the Affidavit of David K. Stone.

Relevant to the purposes of that transaction was the Original Agreement's provision that:

> "Carpenter" shall offer reassignment of the operating rights to "Stone"[1] one year prior to the expiration dates of each lease.

The description of each such lease, indicated the date of expiration of each lease as shown by *Exhibit A* attached to the Original Agreement. Relevant hereto is the State Lease's expiration date of "4/2/02."

As reflected by the modifications to the Original Agreement (*Exhibit 2* to the Affidavit of David K. Stone, hereinafter the "Supplemental Agreement"), Devon Energy Production Company (hereinafter "Devon") essentially assumed the position of Carpenter in the Original Agreement with the selling parties. Said modifications to the Original Agreement became the document entitled "Supplemental Agreement Modifying Letter Agreement dated February 17,

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[1] "Stone" was a reference in the aggregate to all of the selling parties.

2000." (Note that *Exhibit 1* above was physically incorporated as part of *Exhibit 2*.) The Supplemental Agreement executed on or about May 25, 2000, identified changes in the actual signing parties, recognized the side agreement between Devon and Carpenter and otherwise accommodated the needs of Devon and Carpenter. In addition, the provision for the time to act regarding reassignment of the subject operating rights was shortened in the Supplemental Agreement from one year in the Original Agreement to not more than six months prior to said lease expiration date. (See paragraph 6 of the Supplemental Agreement). Most important the five year lease term of the State Lease was not in any manner extended beyond November 2, 2001; the date which was six months prior to the only expiration date in existence as agreed.

As of November 2, 2001, no well had been drilled on the State Lease (or production established which could result in an extension of the lease term).[2] At no time after November 2, 2001 or after demand by Stone did Devon and/or Carpenter offer to reassign or otherwise cause said State Lease interests to be turned over to Plaintiffs. Stone Exploration, Inc. would have accepted the reassignment provided by

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[2] As shown by the actual lease attached as *Exhibit 4* to Stone's Affidavit, the term of a Wyoming State Oil and Gas Lease can be extended by production or "drilling over" the expiration date.

paragraph 6 of the Supplemental Agreement. (See paragraph 10 of Stone Affidavit.)

II. STANDARD OF REVIEW

The standard for summary judgment under W.R.C.P. 56 is well established in Wyoming:

> Summary judgment is appropriate when no genuine issue as to any material fact exists and the prevailing party is entitled to have a judgment as a matter of law. *Eklund v.PRI Environmental, Inc.*, 25 P.3d 511 (Wyo. 2001). A genuine issue of material fact exists when a disputed fact, if it were proven, would have the effect of establishing or refuting an essential element of the cause of action or defense which has been asserted by the parties. *Williams Gas Processing-Wamsutter Co. v. Union Pacific Resources Co.*, 25 P.3d 1064 (Wyo. 2001). We examine the record from the vantage point most favorable to the party who opposed the motion, and we give that party the benefit of all reasonable inferences that may fairly be drawn from the record. *Id.*

Nuhome Investments, LLC v. Weller, 81 P.3d 940 (Wyo. 2003) (quoting *Trabing v. Kinko's, Inc.* 57 P.3d 1248 (Wyo. 2002)). See *Davis v. State*, 910 P.2d 555, 558 (Wyo. 1996); *Smith v. Throckmartin*, 893 P.2d 712, 714 (Wyo. 1995). "The party moving for summary judgment bears the initial burden of establishing a *prima facie* case for a summary judgment. If the

Movant carries this burden, the party opposing the motion must come forward with specific facts to demonstrate that a genuine issue of material fact does exist." *Hiltz v. Robert W. Horn, PC*, 910 P.2d 566, 569 (Wyo. 1996).

The summary judgment procedure is particularly well suited for unambiguous contracts. *Lincoln v. Wackenhut Corp.*, 867 P.2d 701 (Wyo. 1994); *Sturman v. First Nat'l. Bank*, 729 P.2d 667 (Wyo. 1996). Interpretation of the language of an unambiguous contract is a matter of law. *Saulcy Land Co. v. Jones*, 983 P.2d 1200 (Wyo. 1999).

III. ARGUMENT

A. Breach of Contract

The contract issue in this litigation is quite straightforward. "When parties reduce a contract to writing, they must abide by its plainly stated terms." *Patel v. Harless*, 926 P.2d 963, 964 (Wyo. 1996). The basic contract and elements of offer, acceptance and consideration have not been raised as disputed issues by the pleadings. See generally *Boone v. Frontier Refining, Inc.*, 987 P.2d 681 (Wyo. 1999). Nor are the Original or the Supplemental Agreement unenforceable due to unconscionability, vagueness or ambiguity.

The relevant portion of the Supplemental Agreement is paragraph 6 thereof:

> All assignments naming Devon as provided for in this Supplemental Agreement shall, in addition provide that the said Assignee and its successors and assigns shall offer in writing to Stone Exploration, Inc. for the benefit of the Assignor, a *reassignment* of all its rights under any of the leases and lands referred to herein *not later than 6 months prior to the expiration of each such lease.*

(Emphasis added).

The State Lease, as shown by *Exhibit A* attached to *Exhibit 1* of the Affidavit of David K. Stone, was to expire on April 2, 2002. As of six months prior to this expiration date, there was no production attributable to said lease nor had Devon or anyone even commenced drilling on the State Lease land to extend or suspend said lease expiration date. Also, it is undisputed that Devon and/or Carpenter did not offer to reassign any leasehold interests to Stone. Commencing November 2, 2001 Devon and Carpenter were in breach of the obligation to reassign the State Lease as set forth in paragraph 6 of the Supplemental Agreement, and the lawful right of possession provided to Defendants by Plaintiffs under the terms of that agreement ended, and each Defendant had an affirmative duty to turn over all of their interests in said State Lease to Plaintiffs, effective as of November 2, 2001. Defendants have wrongfully kept Plaintiffs out of possession and have the status of a constructive trustee for the benefit of Stone, insofar as the interests they wrongfully control, which should

have been delivered to Stone, together with the profits derived from such wrongfully withheld property.

B. Ejectment

The common law remedy of ejectment is incorporated into Wyoming law by W.S. § 1-32-202. In order to grant the remedy of ejectment, the Plaintiffs need only prove legal or equitable title or right to the real property in question and are being kept from possession thereof. *Bragg v. Marion*, 663 P.2d 505, 506 (Wyo. 1983). See also *Allen v. Houn*, 23 P. 757 (Wyo. 1923.) As shown above, Plaintiffs have the right to possession of the leasehold acquired by the Defendants in said State Lease, as of November 2, 2001, and the Defendants have kept them out of possession thereof ever since.

IV. CONCLUSION

This Court should determine that Defendant Devon and/or Carpenter has each breached paragraph 6 of the Supplemental Agreement by failure to reassign to Plaintiffs the oil and gas interests acquired in the State Lease by reason of the Supplemental Agreement. Having established such breach, both Defendants should be ejected from the State Lease by reason of the fact that neither of the Defendants have any right to possession or title from and after November 2, 2001.

DATED this 28th day of February, 2007.

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN

By: /s/ Stephen R. Winship
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CERTIFICATE OF SERVICE

I, Stephen R. Winship, hereby certify that a true and correct copy of the foregoing **Memorandum In Support Of Plaintiffs' Motion for Partial Summary Judgment** was served upon the following, by **hand-delivery**, this 28th day of February, 2007.

Scott P. Klosterman
Richard E. Day
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159 N. Wolcott, Ste. 400
P.O. Box 10700
Casper, WY 82602

/s/ Stephen R. Winship
Stephen R. Winship

STATE OF WYOMING)
) ss.
COUNTY OF JOHNSON)

IN THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT

DAVID K. STONE and NICHOLAS B. LOUNDAGIN, Plaintiffs, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., and CARPENTER & SONS, INC., Defendant.	)	Civil Action No. CV-2006-0106

MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Mar. 1, 2007)

COME NOW the above-named Plaintiffs, by and through their counsel, and pursuant to W.R.C.P. 56(a) hereby move the Court for partial summary judgment against Defendants on Counts I and III of Plaintiffs' Complaint for the reason that there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law. This partial summary judgment will determine the liability of Defendants and will leave only the damages or remedies for further determination. In support of their motion, Plaintiffs rely upon the Affidavit of David K. Stone and the documents attached thereto,

the memorandum filed simultaneously herewith and the pleadings and documents of record herein. Alternatively Plaintiffs request that pursuant to W.R.C.P. 56(d), this Court determine the material facts that shall be deemed as established.

WHEREFORE Plaintiffs pray this Court will grant them partial summary judgment against Defendants as to the liability portion of the Complaint.

DATED this 28th day of February, 2007.

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN

By: /s/ Stephen R. Winship

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Supreme Court, U.S.
FILED
MAR 15 2010
OFFICE OF THE CLERK

No. 09-826

In The
Supreme Court of the United States

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN,

Petitioners,

v.

DEVON ENERGY PRODUCTION COMPANY, L.P.
and CARPENTER & SONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wyoming

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review a federal constitutional claim that was never presented to, or decided by, the Wyoming Supreme Court.

2. Whether any compelling reasons exist for granting the petition for a writ of certiorari as set forth in Supreme Court Rule 10.

3. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1 to review a petition for writ of certiorari that was not timely filed.

4. Whether Petitioners were denied due process under the Fourteenth Amendment to the United States Constitution.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Devon Energy Production Company, L.P., a Delaware limited partnership ("DEPCO"), is a nongovernmental entity. DEPCO is owned by the following entities: Devon OEI Operating, L.L.C., a Delaware limited liability company ("OEI"), ninety-nine percent (99%); and DVN Operating Company, L.L.C., a Delaware limited liability company ("DVN"), one percent (1%). OEI owns one hundred percent (100%) of DVN. OEI is owned by Devon OEI Holdings, Inc., a Delaware corporation ("OEI Holdings"). OEI Holdings is owned by Devon Energy Corporation (Oklahoma), an Oklahoma corporation ("Devon Oklahoma"). Devon Oklahoma is owned by Devon Energy Corporation, a Delaware corporation ("Devon Energy").

Respondent Carpenter & Sons, Inc., a Wyoming corporation ("Carpenter"), is a nongovernmental corporation. There is no parent corporation or publicly held corporation that owns ten percent (10%) or more of Carpenter.

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INTRODUCTION

Respondents Devon Energy Production Company, L.P. and Carpenter & Sons, Inc. (hereinafter "Respondents") respectfully request that this Court deny the petition for a writ of certiorari filed by Petitioners David K. Stone and Nicolas B. Loundagin (hereinafter "Petitioners") seeking review of the decision of the Wyoming Supreme Court in *Stone v. Devon Energy Prod. Co., L.P.*, 216 P.3d 489 (Wyo. 2009) (hereinafter "*Stone* 2009"). In *Stone* 2009, the Wyoming Supreme Court affirmed summary judgment entered in favor of Respondents on Petitioners' claims for ejectment, trespass and conversion. In affirming the summary judgment, the Wyoming Supreme Court did not address any federal questions or constitutional claims as none were presented to it. Rather, the Wyoming Supreme Court dispensed with Petitioners' claims under state law.

The scope of this Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a). The relevant portion of that statute provides that final judgments of the highest court of a state may be reviewed by the Supreme Court by writ of certiorari: "where any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (emphasis added). The Wyoming Supreme Court's decision in *Stone* 2009 did not affect any title, right, privilege, or immunity specially set-up or claimed

under the United States Constitution or, for that matter, the Wyoming Constitution.

Where, as here, jurisdiction under 28 U.S.C. § 1257(a) is lacking, the petition for a writ of certiorari (hereinafter "Petition") should be denied.

COUNTERSTATEMENT OF THE CASE[1]

This case concerns the reassignment of a state oil and gas lease which was decided on state law grounds and involved no federal questions or constitutional claims.

Petitioners' statement of the case contains a number of inaccurate and unsupported factual allegations.[2] The true facts are as follows:

---

[1] References to the Petition and its Appendix are cited as "Pet." and "Pet.App." respectively.

[2] A few of the most egregious examples of Petitioners' misstatements are the following: (1) "Despite Stone and Loundagin's protests, several more wells were drilled by Devon producing revenues from the extracted natural gas exceeding $55 million." (Pet. at p. 3). There is no evidence in the state court record that the wells drilled on the State Lease produced revenues exceeding $55 million. In addition, there is no evidence in the state court record that Stone and Loundagin protested the drilling of any wells on the State Lease; (2) "When the parties' negotiations for an extension of the deadline failed, Stone sent written demand to Devon on December 6, 2001 to reassign the State Lease. This demand was ignored by Devon and, without any authorization from Stone and Loundagin, Devon began drilling a shallow well on the State Lease on March 30, 2002."

(Continued on following page)

In 1997, Petitioner David K. Stone (hereinafter "Stone") acquired a state oil and gas lease (hereinafter "State Lease") covering land located in Johnson County, Wyoming. The State Lease provided that it would remain in effect for a primary term of 5 years or so long thereafter as oil, gas and associated hydrocarbons were produced from the lands in paying quantities, and that it could be extended beyond the primary term absent production as provided by Wyoming law. The State Lease further provided that if drilling, completion, testing or reworking operations were being diligently conducted during the primary or an extended term, it would continue in effect so long as such operations continued, and as long thereafter as oil and gas were being produced in paying quantities. (Pet.App. at pp. 22-23).

Stone later assigned an undivided 50% of the operating rights under the State Lease to Stone Exploration, Inc. (hereinafter "SEI") and the other undivided 50% of the operating rights to Petitioner Nicholas B. Loundagin (hereinafter "Loundagin"). SEI and Loundagin then assigned their interests in the State Lease to Respondent Carpenter & Sons, Inc.

(Pet. at p. 3). There is no evidence in the state court record that the parties negotiated the extension of any deadline. Furthermore, the state court record is clear that Devon did not ignore Stone's letter dated December 6, 2001. In fact, on January 3, 2002, Devon sent a letter to Stone advising him of the intent and purpose of the reassignment provision and of the activities Devon was undertaking to ensure that the State Lease did not expire.

(hereinafter "Carpenter"), subject to the reservation of an overriding royalty interest and ownership of the "deep" rights. *Id.* at p. 23.

In May of 2000, the parties entered into a supplemental agreement covering the State Lease and other leases in the area by which Respondent Devon Energy Production Company, L.P. (hereinafter "Devon") acquired most of the rights owned by Carpenter ("Supplemental Agreement"). Carpenter retained a 10% working interest. The Supplemental Agreement contained a reassignment provision which required Devon to offer in writing to SEI a reassignment of all its rights under any of the leases not later than six months prior to the expiration of each such lease. *Id.* at p. 24. At the time the parties executed the Supplemental Agreement, there was no production of oil or gas on the State Lease and the primary term would expire on April 2, 2002. *Id.*

Devon and Carpenter did not offer to reassign the operating rights under the State Lease to SEI by October 2, 2001, six months prior to the expiration of the primary term. *Id.* at p. 24. On December 6, 2001, Stone wrote to Devon advising that the primary term of the State Lease would expire in less than four months and requesting compliance with the reassignment provision in the Supplemental Agreement. Devon responded to Stone by letter dated January 3, 2002 stating that the intent of the reassignment provision is to prevent the leases from expiring and that Devon planned to take action to

prevent the State Lease from expiring. As a result, the State Lease would not expire at the end of the primary term on April 2, 2002, and therefore reassignment of the State Lease to SEI was not due. *Id.* at p. 25.

As promised, Devon began drilling operations on the State Lease on March 30, 2002, and such operations were being diligently conducted prior to the expiration of the primary term. The well was completed and production commenced by mid-April 2002. *Id.*

In 2006, with production continuing on the State Lease and Petitioners continuing to receive their overriding royalty payments from said production, Petitioners filed a complaint in the Fourth Judicial District Court of Wyoming asserting claims for breach of contract, ejectment, specific performance, trespass, conversion, an accounting and injunctive relief. *Id.* at 26. Respondents answered the complaint denying Petitioners' claims and asserted that, due to Devon's diligent operations conducted prior to the expiration of the primary term, the term of the State Lease had been extended and therefore they were not required to make a reassignment offer. On the parties' cross-motions for summary judgment, the District Court granted Respondents' motion for summary judgment on the breach of contract claim, finding that the obligation to make an offer of reassignment never arose because the term of the State Lease did not expire. *Id.* at pp. 4-5.

Petitioners appealed the District Court's order granting summary judgment to Respondents on the breach of contract claim. On April 22, 2008, the Wyoming Supreme Court issued its decision in *Stone v. Devon Energy Prod. Co., L.P.*, 181 P.3d 936 (Wyo. 2008) (hereinafter "*Stone* 2008") affirming the summary judgment entered in favor of Respondents on the breach of contract claim. *Id.* at pp. 21-45. In its decision, the Wyoming Supreme Court stated:

> . . . we can affirm a district court's summary judgment order on any basis apparent in the record. Here, Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of contract. . . . In the relatively few cases involving oil and gas lease reassignment clauses, courts have unanimously held that the measure of damages for breach of the clause is the value of the lease at the time the lease terminates. . . . Here, the lease never terminated and thus, Mr. Stone and Mr. Loundagin incurred no damages. They have continued to enjoy the benefit of their bargain, e.g., the timely payment of all overriding royalties due under the lease. We have found no case in which the overriding royalty owner was deemed to have been damaged by a failure to reassign when the lease did not terminate. This is not surprising since the fundamental purpose of the reassignment clause is to protect the overriding royalty interest holder from termination of the lease – no termination, no damage.

Id. at p. 39 (emphasis in original) (internal citations omitted).

The Wyoming Supreme Court further stated that:

> With respect to the remaining claims for ejectment, trespass and conversion, it seems clear from the limited record before us that they, like the damages, cannot be established. . . . Throughout the contractual relationship, Devon has held the right to drill and produce from the lands subject to the lease. The reassignment clause was intended to give Mr. Stone and Mr. Loundagin the right to reassignment of the operating rights in the event it appeared the lease was going to be lost. It was not lost and Devon was operating properly as the working interest owner under the terms of the assignment. It, therefore, seems unlikely that the assignors can prove the elements of ejectment, trespass and conversion because each of these claims requires proof that Devon wrongfully entered and exercised dominion over the property to the exclusion of the assignors. However, the district court has not addressed these claims and we remand this matter for that purpose.

Id. at pp. 40-41.

Petitioners filed a *Petition For Rehearing* with the Wyoming Supreme Court asserting that "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court . . . The fundamental requirement of due process is

the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at p. 76. On May 20, 2008, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. *Id.* at pp. 19-20. This was a final judgment of the Wyoming Supreme Court which fully adjudicated Petitioners' breach of contract claim.

On remand, the parties filed cross-motions for summary judgment on the remaining claims of ejectment, trespass and conversion and the District Court granted summary judgment to Respondents. Petitioners once again appealed the decision to the Wyoming Supreme Court. *Id.* at p. 3. On October 13, 2009, the Wyoming Supreme Court issued its decision in *Stone* 2009 affirming the summary judgment entered in favor of Respondents on the remaining claims of ejectment, conversion and trespass. *Id.* at pp. 1-13.

Petitioners again filed a petition for rehearing with the Wyoming Supreme Court asserting that its decision in *Stone* 2009 "does not review or address all claims for relief in Plaintiff-Appellants' complaint." *Id.* at 65. On October 13, 2009, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. *Id.* at pp. 63-64. This was a final judgment of the Wyoming Supreme Court which fully adjudicated Petitioners' claims for ejectment, conversion and trespass.

REASONS FOR DENYING THE PETITION

I. The Question Presented in the Petition for a Writ of Certiorari Was Never Presented to, or Decided by, the Wyoming Supreme Court; Therefore, this Court Lacks Jurisdiction

Petitioners ask this Court to review a federal constitutional claim that was never presented to, or decided by, the Wyoming Supreme Court. Under 28 U.S.C. § 1257(a) and this Court's longstanding precedent, Respondents respectfully submit that this Court lacks jurisdiction to hear the claim presented for review.

In this Petition, Petitioners present for the first time the argument that "[t]he Wyoming Supreme Court's method of determining the damage issue" violated their procedural due process rights under the Fourteenth Amendment of the United States Constitution. (Pet. at p. 10). This argument is newly minted and was neither presented to, nor decided by, the Wyoming Supreme Court. Rather, the question before the Wyoming Supreme Court in *Stone* 2009 was whether, under state law, summary judgment denying Petitioners' claims for ejectment, trespass and conversion was properly entered by the District Court. (Pet.App. at pp. 1-13).

The scope of this Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a) which provides as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(emphasis added).

Under 28 U.S.C. § 1275(a) and its predecessors, this Court has "unfailingly refused to consider any federal-law challenge to a state-court decision *unless the federal claim 'was either addressed by or properly presented to the state court* that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)) (emphasis added). See also, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981) (It is well-settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal

claim was adequately presented in the state system."); *Mental Hygiene Dept. of California v. Kirchner*, 380 U.S. 194, 197-198 (1965) ("This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.").

This Court has discussed several crucial bases for this "not pressed or passed upon" rule. See *McGoldrick v. Compagnie General*, 309 U.S. 430, 435-436 (1940). The first vital concern is comity. This Court has long held that "'it would be unseemly in our dual system of government' to disturb the finality of state judgment on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 91 (quoting *Webb*, 451 U.S. at 500); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In addition, there are other important practical considerations that this Court has noted in connection with this rule. For example, the rule protects this Court's scarce resources by avoiding unnecessary consideration of cases where state courts resolve issues in accordance with state law. *Adams*, 520 U.S. at 90-91; *Webb*, 451 U.S. at 500. The rule assists this Court by allowing for proper development and refinement of the record, including: the pertinent facts and law; the state court's reasoning for its decision; and, the issues presented by the parties. *Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439.

Clearly, these well-settled bases for declining to consider a petition such as the one presented herein are vitally important to the judiciary. This Court has concluded that scrupulous adherence to the "not pressed or passed upon" rule will "promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). This conclusion is equally true and applicable in the instant case.

Supreme Court Rule 14(g)(i) compliments the "not pressed or passed upon" rule by mandating that the petitioner seeking a writ of certiorari specify: (1) the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed was first raised; (2) the method or manner of raising the federal question; (3) how the federal question was passed on by those courts; and (4) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The wisdom of the requirements set forth in SUP. CT. R. 14(g)(i) is underscored where, as here, Petitioners have completely failed to comply with the requirements of the rule. The explanation for Petitioners' failure to comply with SUP. CT. R. 14(g)(i) is simple: there was no federal constitutional claim

presented to, or decided by, the Wyoming Supreme Court. As the state court record fully reflects, there is no discussion or decision regarding the federal constitutional claim the Petition now purports to frame. In the briefs filed with the District Court as well as the Wyoming Supreme Court in *Stone* 2009, Petitioners never mention the phrase "due process" or cite to the federal Constitution. Moreover, the Wyoming Supreme Court's decision in *Stone* 2009 does not address any federal claim nor does it cite to, refer to, rely on, or mention the federal constitution in any way. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . " *Adams*, 520 U.S. at 86-87 (citations omitted). The silence of the Wyoming Supreme Court on the federal constitutional claim flows from the fact that the case involved state law issues, not federal constitutional claims.

Pragmatically speaking, it is appropriate to place the burden on petitioners to this Court to interject the "federal" nature of any given claim into the proceedings below. Otherwise, in every direct appeal of a summary judgment in the state courts, the respondents would be forced to brief all federal constitutional claims and the state courts would be forced to address such claims regardless of whether the petitioners actually raised such claims, or, in fact, intended to do so. It would be completely unfair to place the burden on state courts to be clairvoyant by requiring them to determine whether they are inadvertently missing an opportunity to address a

federal claim. This is especially true when an unarticulated federal claim could possibly serve as a basis for reversal by this Court. Surely, if the concept of comity is to have any meaning, then a party must be required to posit a claim in the state court in such a manner as to make that court aware of the alleged federal nature of the claim. The more appropriate course of action is to continue to apply this Court's longstanding precedent, set forth above, which requires the petitioners in this Court to demonstrate that the question presented in the petition for a writ of certiorari was actually presented to and decided by the state court.

Petitioners failed to raise or present any federal constitutional claim in *Stone* 2009 and thus the Wyoming Supreme Court did not decide such a claim. For the foregoing reasons, this Court is without jurisdiction to review the claim presented herein and should deny the Petition.

II. There are No Compelling Reasons for Granting the Petition for a Writ of Certiorari

In accord with the congressionally-mandated jurisdictional limit set forth in 28 U.S.C. § 1257(a), this Court has adopted Rule 10 which provides in pertinent part as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for*

> *compelling reasons*. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (b) a state court of last resort *has decided* an *important* federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals *has decided* an *important* question of federal law that has not been, but should be, settled by this Court, or has decided an *important* federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10 (emphasis added).

An examination of the *Stone* 2009 decision reveals that the Wyoming Supreme Court did not decide a federal question, much less, (1) an important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals; or (2) an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court. Although the Petition alleges that "[t]his Court's jurisdiction is invoked under 28 U.S.C. § 1257(a)" (Pet. at p. 1), Petitioners failed to identify any federal question presented to, or decided by, the Wyoming Supreme Court in *Stone* 2009.

Therefore, there is no compelling reason for this Court to grant the Petition.

III. Petitioners Failed to Timely File a Petition for a Writ of Certiorari Raising the Due Process Claim; Therefore this Court Lacks Jurisdiction

Petitioners filed a writ of certiorari of the Wyoming Supreme Court's October 13, 2009 decision in *Stone* 2009, which adjudicated Petitioners' state law claims for ejectment, conversion and trespass. However, the constitutional claim now raised by Petitioners relates solely to their breach of contract claim that was finally adjudicated by the Wyoming Supreme Court on May 20, 2008 in *Stone* 2008. Therefore, the Petition was not timely filed, and this Court lacks jurisdiction to hear the Petition.

SUP. CT. R. 13.1 and 28 U.S.C. § 2101(c) provide that a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort must be filed within 90 days of the entry of the judgment. This Court has repeatedly held that the filing period for civil cases is jurisdictional. See *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). Indeed, this Court's Rule 13.2 cites 28 U.S.C. § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (emphasis added).

On April 22, 2008, the Wyoming Supreme Court issued its decision in *Stone* 2008 affirming the summary judgment entered in favor of Respondents on Petitioners' breach of contract claim. (Pet.App. at

pp. 21-45). The Wyoming Supreme Court stated that the basis for its decision was that Petitioners suffered no breach of contract damages because "[t]he [State] lease was not lost and they have received the overriding royalty payments due under the agreement." *Id.* at p. 40. The Wyoming Supreme Court further stated that, with respect to the remaining claims for ejectment, trespass and conversion "the district court has not addressed these claims and we remand this matter for that purpose." *Id.* at p. 41. Petitioners' assertion that the proceedings in the District Court were "for all practical purposes a declaratory judgment" is erroneous. (Pet. at p. 8). Petitioners did not bring a claim for declaratory judgment in the District Court; rather, they filed a motion for summary judgment on their breach of contract claim. (Pet.App. at pp. 103-104).

On May 7, 2008, Petitioners filed a *Petition For Rehearing* with the Wyoming Supreme Court asserting that "[t]here is nothing in the record on appeal regarding Appellants' breach of contract damages or other kinds of damages suffered by Plaintiff [sic], and thus Appellants did not have an opportunity to be heard at a meaningful time and in a meaningful manner regarding damage issues." (Pet.App. at p. 79). Petitioners filed a brief in support of their petition for rehearing wherein they asserted "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (Pet.App. at p. 76). On

May 20, 2008, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. (Pet.App. at pp. 19-20). This was the final adjudication of the Wyoming Supreme Court on Petitioners' breach of contract claim in *Stone* 2008.

Pursuant to 28 U.S.C. § 1257(a), "[*f*]*inal judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . ." (emphasis added). Petitioners assert that the Wyoming Supreme Court's decision in *Stone* 2008 "was not a final appealable order because of the remand." (Pet. at p. 5 fn. 2) (citing *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995); *Lofflund Bros. Co. v. Rougeau*, 655 F.2d 1031 (10th Cir. 1981)).[3] Petitioners' assertion is incorrect.

A state court judgment is denominated as "final" if the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). Where the order or judgment is final in this sense, the time for filing a petition to this Court runs from the date of the appellate court's order, since the objective of the

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[3] Petitioners' reliance on *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995) and *Lofflund Bros. Co. v. Rougeau*, 655 F.2d 1031 (10th Cir. 1981) is misplaced because the cases address the jurisdiction of the United States Court of Appeals under 28 U.S.C. § 1291. They do not address this Court's jurisdiction which is determined under 28 U.S.C. § 1257(a).

statute is to limit the petitioner's time to three months from the date when the finality of the judgment for purposes of review is established. *Id.*

In *Stone* 2008, the Wyoming Supreme Court fully adjudicated Petitioners' breach of contract claim. (Pet.App. at pp. 39-41). Petitioners subsequently filed a petition for rehearing claiming that their due process rights were violated because "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court." (Pet.App. at p. 76). The Wyoming Supreme Court denied the petition for rehearing without opinion, at which point a final judgment existed with respect to Petitioners' breach of contract claim. No further review or correction in any other state tribunal was available to the Petitioners with respect to their breach of contract claim. Petitioners' due process claim is tied to and arises out of the breach of contract claim adjudicated in *Stone* 2008. The due process claim is in no way related to the remanded claims of ejectment, trespass and conversion adjudicated in *Stone* 2009. In order to timely raise their due process claim, Petitioners were required to file their petition for a writ of certiorari within 90 days of the Wyoming Supreme Court's *Order Denying Petition for Rehearing* that was issued on May 20, 2008. They did not. The failure of Petitioners to timely file their Petition is jurisdictional. *Federal Election Comm'n*, 513 U.S. at 90.

Therefore, this Court lacks jurisdiction to hear Petitioners' claim alleging due process violations.

IV. Petitioners Were Not Denied Due Process Under the Fourteenth Amendment to the United States Constitution

Petitioners assert that their procedural due process rights were violated by the Wyoming Supreme Court because they were denied the opportunity to address damages arising out of the breach of the reassignment provision found in the Supplemental Agreement. (Pet. at pp. 6-8). Petitioners' assertion is erroneous because, under well-established case law, the measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease *at the time the lease terminates*. *Tennaco Oil Co. v. Gaffney*, 369 F.2d 306, 309 (10th Cir. 1966). See also Paul W. Easton, Jr., "*The Reassignment Provision – Meaningful or Not?*" 20 Rocky Mountain Mineral Law Institute 601, 614; James M. Colosky, "*The Reassignment Provision – The Agony in the Oversight*," Chapter 5, Rocky Mountain Mineral Law Institute 5-29.

A summary judgment hearing was held before the District Court on April 30, 2007, at which Petitioners' counsel admitted that the State Lease had never expired or terminated. (Pet.App. at p. 58 fn. 2). Based upon this admission, the Wyoming Supreme Court correctly found that "Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of

contract. . . . *Here, the lease never terminated and thus, Mr. Stone and Mr. Loundagin incurred no damages*. They have continued to enjoy the benefit of their bargain, e.g., the timely payment of all overriding royalties due under the lease." *Id.* at pp. 38-39 (emphasis added).

As set forth in the *Stone* 2008 decision, the Wyoming Supreme Court "can affirm a district court's summary judgment order on any basis apparent in the record." *Id.* at p. 38. The Wyoming Supreme Court did just that when it applied an undisputed fact contained in the record (the State Lease never expired or terminated) to the applicable law (the measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease at the time the lease terminates) to arrive at its conclusion that "[w]e have found no case in which the overriding royalty owner was deemed to have been damaged by failure to reassign when the lease did not terminate. This is not surprising since the fundamental purpose of the reassignment clause is to protect the overriding royalty interest holder from termination of the lease – no termination, no damage." *Id.* at 39.

Contrary to Petitioners' assertion, the Wyoming Supreme Court did not violate Petitioners' due

process rights and deprive them of a valuable property interest.[4]

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

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[4] Citing *Connecticut v. Doehr*, 501 U.S. 1 (1991), Petitioners assert that "Stone and Loundagin held a reversionary interest in these oil and gas interests that are subject to protection under the Fourteenth Amendment." (Pet. at p. 9). Petitioners' assertion is incorrect. Petitioners hold certain contract rights as defined by the Supplemental Agreement, and those rights do not include a reversionary interest. Furthermore, even a superficial analysis of the *Connecticut* decision shows that the case does not stand for the proposition Petitioners assert. In *Connecticut*, this Court held that a Connecticut state statute authorizing pre-judgment attachment of real property without prior notice or hearing or without a showing of exigent circumstances did not satisfy due process requirements. *Connecticut*, 501 U.S. at 1. The *Connecticut* decision is inapposite and has no application to the facts of this case.

Supreme Court, U.S.
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No. 09-826

In The
Supreme Court of the United States

DAVID K. STONE AND NICHOLAS B. LOUNDAGIN,

Petitioners,

v.

DEVON ENERGY PRODUCTION COMPANY, L.P. AND CARPENTER & SONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Wyoming Supreme Court

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I. Since the Issue of Damages Arose for the First Time as Part of the Wyoming Supreme Court Decision, there was No Notice or Opportunity to Address this Issue.

In practical effect, the brief of Respondents, Devon Energy Production Company, L.P. and Carpenter & Sons, Inc. ("Devon and Carpenter") confirms the reasons asserted by Petitioners, David K. Stone and Nicholas B. Loundagin ("Stone and Loundagin") for granting a writ of certiorari, since Devon and Carpenter agree that the nature of the proceedings in the state district court did not address or raise the issue that the Wyoming Supreme Court relied upon to decide the appeal in *Stone I*, (Pet. App. 21). Specifically the procedural background of the case shows that the matter before the Wyoming Supreme Court in *Stone I* was only directed to Stone and Loundagin's Motion for Partial Summary Judgment (Pet. App. 103), which motion addressed only whether Devon was required under the Supplemental Agreement to have reassigned the State Lease operating rights six months prior to the expiration of the lease term. Because of the bifurcated nature of this summary judgment motion, the fact intensive and complex issues of determining the contractual damages was to be reserved until Devon's liability under the Reassignment Clause was determined. Nowhere does the brief of Devon and Carpenter cite to any place in the appendix (or the record on appeal) where the damages Stone and Loundagin suffered by reason of Devon's contractual breach were even raised. Nevertheless Devon and

Carpenter would apparently have Stone and Loundagin anticipate that there would be a Fifth Amendment issue when they filed and argued their motion for partial summary judgment. Thus the primary point of Petitioners' lengthy appendix is to show that Stone and Loundagin never had notice or opportunity in the lower court to "present" upon the very issue that the Wyoming Supreme Court decided the case upon. The very absence of the issue of damages in the parties' pleadings and briefs leading up to *Stone I* proves that Stone and Loundagin were "blindsided" by the Wyoming Supreme Court's *Stone I* decision. How can Petitioners cite to something in the record when they were taken by surprise by an appellate court stepping into a fact finding role?

After *Stone I* was issued, Stone and Loundagin timely filed their Petition for Rehearing to the Wyoming Supreme Court wherein Stone and Loundagin asserted the Fifth Amendment issue that is the subject of their pending Petition to this Court. (Pet. App. 76-77). The claim at issue was presented, through their Petition for Rehearing to the Wyoming Supreme Court, with "fair precision and in due time". *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980).

What is most notable about Devon and Carpenter's brief is its failure to cite any case from this Court which addresses the issue of "surprise" in the context of the "notice and opportunity" requirement under the Fifth Amendment such that Stone and Loundagin would not be able to prove any damages.

II. *Stone I* Was Not A Final Appealable Decision.

Devon and Carpenter contend that Stone and Loundagin's Petition for Writ of Certiorari was untimely since the Constitutional issue arose as a result of the *Stone I* decision. (Resp. Brief at 16). This Court, like other appellate courts, cannot review a state court judgment until it is final. *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 76 (1997); *O'Dell v. Espinova*, 456 U.S. 430 (1982). Devon and Carpenter contend that Stone and Loundagin's Petition for Writ of Certiorari was untimely since the Constitutional issue arose as a result of the *Stone I* decision. (Resp. Brief at 16). The decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982) presents a similar procedural situation as the instant case in which the Mississippi Supreme Court, like the Wyoming Supreme Court in *Stone I,* remanded the case for further proceedings. Because of the remand, the first decision of the Mississippi Supreme Court was not reviewable by this Court. *Id.* at 262. See also *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995); *Loffland Bros. Co. v. Rougeau*, 655 F.2d 103 (10th Cir. 1981). In summary, *Stone I* was not a final and appealable order under 28 U.S.C. §1257.

III. Stone and Loundagin Were Denied Their Procedural Due Process Rights.

Devon and Carpenter contend there was no denial of Stone and Loundagin's due process rights since " . . . under well-established case law, the

measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease at the time the lease terminates." (Resp. Brief at 20). Not only is this an erroneous statement of the law, but it misses the entire point of the Petition for Writ of Certiorari. Stone and Loundagin never had the opportunity to address this damage issue. Further *Stone I* appears to affect a fundamental change in the determination of breach of contract damages rather than to reiterate "well-established case law". More precisely the decision could be interpreted as reversing, *sub silentio*, the Wyoming Supreme Court's decision in *Sagebrush Dev. v. Moehrke*, 604 P.2d 198, 204 (1979), which held that "[d]amages are measured as of the date of the breach". The *Moehrke* standard appears to be an almost universally accepted standard reflecting long accepted common law precedent for determining the date as of which breach of contract damages are determined. See 22 *Am. Jur.* 2d Damages §78 at 113 (2003):

> Damages for a breach of contract are to be determined as of the time of the occurrence of the breach, with interest to the date of judgment and not from a prior date. Under this rule, later events such as fluctuations in value after the breach do not affect the measure of damages.

Devon and Carpenter's brief incorrectly cites *Tennaco Oil Co. v. Gaffney*, 369 F.2d 306, 309 (10th Cir. 1966) for the proposition that the measure of damages for breach of a reassignment provision in a

oil and gas lease is the value of the lease at the time the lease terminates. Quite to the contrary, *Gaffney* actually holds, consistent with *Moehrke*, that "[t]he proper measure of damages was the value of the property at the time the deed ought to have been delivered . . . " *Gaffney*, 369 F.2d at 309. If Stone and Loundagin had been allowed the opportunity to argue their damages, they would have pointed out that the purpose of the Reassignment Clause was not merely to protect the timely payment of overriding royalties (of which there were none at the time of the breach or on the date set for lease termination), but it was primarily to also allow Stone and Loundagin the opportunity to develop a valuable oil and gas prospect.

If, *arguendo*, there were no damages suffered by Stone and Loundagin as a result of Devon's breach, then the Wyoming Supreme Court should have at least allowed a trial on the specific performance claim asserted by Stone and Loundagin. The remedy of specific performance is appropriate when " . . . damages for breach are an inadequate and impractical remedy under the circumstances of the case." *Rainbow Oil Co. v. Christman*, 656 P.2d 538, 545 (Wyo. 1982).

> The object in such cases [specific performance] is to place the party without fault in as nearly the same position as he would have been had there been no default by the other party. The guiding principle in such cases is

> *to relate the contract back to the date set therein.*

Ekberg v. Sharp, 76 P.3d 1250, 1257 (Wyo. 2003) (citations omitted) (emphasis added).

By adapting the contractual damages rationale of *Stone I* to decide *Stone II*, the Wyoming Supreme Court has impermissibly blurred the distinction between contract and property law concepts. Damages arising from a breach of contract are separate and distinct from the claims for relief under property law concepts, such as reflected in the ejectment and trespass claims of Stone and Loundagin (See, e.g., mesne profits as an ejectment remedy. *Dumas v. Ropp*, 558 P.2d 632 (Idaho 1997); *Brown v. Grady*, 92 P. 622 (Wyo. 1907).) By applying the contractual damage analysis under *Stone I* to Stone and Loundagin's property law claims under *Stone II*, the Wyoming Supreme Court has perpetuated and compounded the original error of refusing to allow Stone and Loundagin the opportunity to present argument on the contractual damages resulting from Devon's breach of the Reassignment Clause.

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